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THE JURIDICAL REVIEW

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JURIDICAL REVIEW

EDITORIAL

The Juridical Review, a Journal of Legal and Political Science, was first published in the year 1889 and the policy of the founder, the late Mr. Charles Edward Green, then formulated in conjunction with Professor Goudy and Sheriff Will C. Smith, K.C., has remained essentially the same throughout the sixty-seven years of its existence. During that long time *The Juridical Review* has been the only legal periodical of its kind published in Scotland, and that it has acquired a world-wide reputation is evidenced by the consistent citation of its articles by legal writers everywhere.

Now, with this number, *The Juridical Review* enters a new phase in its career. For some time past members of the Law Faculties of the four Scottish Universities—St. Andrews, Glasgow, Aberdeen and Edinburgh—have had a desire for a journal similar to that published by Universities and Law Schools elsewhere, but the folly of attempting to launch yet another legal periodical in Scotland was apparent. It was obvious, too, that *The Juridical Review* could serve the purpose the Universities had in mind, and, by a happy and harmonious arrangement with the publishers, *The Juridical Review* now appears as the Law Journal of the Scottish Universities. An editorial board has been constituted on which the present editor is joined by a representative from the Law Faculty of each of the four Universities.

In its essentials the policy laid down in 1889 remains unchanged. The place of publication being in Scotland, *The Juridical Review* will continue to devote special attention to the law of Scotland in both its principles and its practice; and reform of the law will not be overlooked.

J. R.

There will be a critical record of leading decisions by the Courts in Scotland and England including the Privy Council, as well as an analysis of important legislation, reports of Royal Commissions, Departmental Committees, etc. Current legal periodical literature and books published will, as before, be adequately dealt with.

The Juridical Review will, of course, look for its principal support, certainly in contributions, to the Law Faculties of the Scottish Universities and to the legal profession in Scotland; but its columns will be open to jurists the world over and its scope will be international as well as national.

The aim of the editorial board and of the publishers is to produce a journal of high standard worthy of Scots Law and in this task they confidently invite and expect the fullest co-operation from Scottish lawyers and law students, if not all as contributors, then surely as subscribers.

G. R. T.

JUS QUAESITUM TERTIO: REMEDIES OF THE " TERTIUS " IN SCOTTISH LAW[1]

THE general rule in Scots law, as in most other systems, is expressed in the proposition, " *res inter alios acta, aliis nec nocet, nec prodest.*" In the law of contract there are, however, important exceptions to this rule, including among other categories cases where a third party (not being a principal in a contract concluded by an agent) acquires rights under a contract entered into between others for his benefit. This category, which involves consideration of the " Jus Quaesitum Tertio," will be the subject of this paper.

It may be observed, incidentally, that Scots law contrasts strikingly with English law in this aspect of the law. The law of Scotland does not regard " consideration " as the badge of a valid informal contract, and thus has not been restricted to the same extent by the doctrine of " privity of contract " which prevented the English common law from recognising the *jus quaesitum tertio*. As Lord Haldane said in *Dunlop* v. *Selfridge*[2]: " In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract." Indeed, so concerned were the English judges with this principle of privity of contract that it frustrated for many years the development of the law of negligence in delict or reparation in cases where A., who was liable to B. in contract, by his carelessness caused harm to C. The restrictive concept of " particular duty " in the English law of tort (which has now been imposed on the Scottish law of reparation) was traced by the late Professor Sir Percy Winfield to the obsession of the English common law judges with " privity of contract."[3] English law has now substantially overcome the restrictions of " privity of contract " in the field of tort, but has so far proved less able to circumvent the categoric rule in contract that consideration must move from the promisee. Such amelioration of the law as has been achieved has been by isolated statutory exceptions and through the equitable concept of trust. This has been regretted by writers of authority,[4] while the Law Revision Committee[5] has advocated the elimination of the indirect approach through trust in cases where a contract expressly purports to confer a benefit on a third party, and would make the benefit directly enforceable by him.

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[1] Based on a paper prepared for the Fourth International Congress of Comparative Law, Paris, August 1–7, 1954, entitled " Liability to Third Parties for Breach of Contract." A general report on the solutions of various legal systems to the problems which arise in this field has been compiled by Prof. J. Limpens of the Universities of Ghent and Brussels. His own learned contribution dealing with the law of Belgium in this field was published in the *Revue de Droit International et de Droit Comparé* (1954), p. 98 *et seq*. See also a comparative monograph dealing with the *jus quaesitum* in many systems of law including Scots law—" Stipulations for a Third Party " by G. W. F. Dold, published London, 1948.

[2] [1915] A.C. 847 at p. 853.

The law of Scotland was not restricted by the doctrine of " consideration " to set up concluded agreement, nor by forms of action, nor by a separation between the administration of law and of equity. Thus, just as an assignee in Scotland could sue in his own name (which he could not at common law in England), so also he could, in certain circumstances, enforce a contract made by others for his benefit. Following the canon law the rule in Scotland is that all pactions and promises intended to create a legal obligation are enforceable by those in whose favour they were made, if they can be proved, in court of law.[6]

A characteristic of Scots law is the authority conceded to certain " institutional writers," among whom the highest in reputation is Stair, at one time President of Scotland's

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[3] See " Duty in Tortious Negligence," *Columbia Law Review*, Vol. 34, pp. 41–46, January, 1934, reprinted *Select Legal Essays*, p. 70, esp. p. 84 *et seq*.

[4] See Pollock on *Contracts*, 13th ed., by Winfield, p. 172, and authorities cited; Cheshire and Fifoot, *Contract*, 4th ed., p. 375 *et seq*., Lawson, *The Rational Strength of English Law*, pp. 43–44. *Cf.* Chitty on *Contracts*, 21st ed., 62–63.

[5] Sixth Interim Report, para. 50 (9).

[6] Stair I.10.7. *Cf.* Dr. H. Coing, " English Equity and the Denunciatio Evangelica of the Canon Law " (1955) 71 L.Q.R. 223.

Supreme Civil Court, the Court of Session. He was strongly influenced, as were the most eminent Scottish lawyers until the Napoleonic Wars, by the teaching of the Continental jurists—particularly those of the Low Countries and France. In 1681 he published his *Institutions*, which restated the law of Scotland, and to a substantial extent reorientated it in accordance with the best contemporary legal thought. Though owing much of his inspiration to Grotius he declined to accept the views expressed by Grotius on pollicitation (enforceable promises) and on the *stipulatio alteri.*[7] On the "Jus Quaesitum Tertio" Stair observes[8]: "It is likewise the opinion of Molina, and it quadrates with our customs, that when parties contract, if there be any article in favour of a third party, at any time, *est jus quaesitum tertio*, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform. So a promise, though gratuitous, made in favour of a third party, that party, albeit not present, or accepting, was found to have right thereby." He quotes four cases,[9] of which the earliest is dated 1627, though in fact our reports include an earlier case wherein the *jus quaesitum tertio* was recognized.[10] Indeed the cases are a better foundation for Stair's proposition than Molina's *Disputatio* 265.

In fact, however, the doctrine of *jus quaesitum tertio* has not been conceded such wide scope by the Scottish courts as Stair contended for in the passage cited.[11] In the case of *Carmichael* v. *Carmichael's Executrix*[12] Lord Dunedin reviewed the law in considerable detail, and subjected Stair's statement of the law to a good deal of interpretation and textual criticism on the point in particular as to when a *jus quaesitum* may be revoked by consent of the original parties to the contract. Lord Dunedin stressed that Stair's statement of the law would only be accurate if the true reading were—" if there be any article in favour of a third party which cannot be recalled by either or both of the contractors, *est jus quaesitum tertio.*" In short, irrevocability would be " a condition not a consequence of the expression of the *jus* in favour of the *tertius.*" This particular aspect of the doctrine of *jus quaesitum*—namely the limits within which the original benefactor may revoke the benefit to be conferred on the *tertius* while the debtor in the obligation remains neutral—need not be developed. It may be observed, however, that in Scots law, unlike some other systems including South African law, *acceptance* by the *tertius* is not regarded as the vital fact in completing the right, though, of course, as in donation a benefit cannot be forced on another. In Scottish law the important consideration in deciding if a *tertius* has acquired an indefeasible right is whether the promise in his favour has been supplemented by delivery, registration, or in some cases intimation, so as to preclude the stipulator from revoking his original *animus donandi.* Death of the stipulator may have like effect.

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[7] For this reason the different development of the *stipulatio alteri* in Roman-Dutch law is of special interest to a Scottish lawyer. See Wessels' *Contract*, i, §§ 1743 *et seq.*; Lee, *Introduction to Roman-Dutch Law*, 5th ed., 243, 437; Lee and Honore, *South African Law of Obligations*, §§ 138–141.

[8] Inst. I.10.5. *Cf.* Voet 2.14.12; Groenewegen 3.19(20).5; Grotius' *De Jure Belli ac Pacis* 2.11.18–19 and Inleidinghe 3.3.38.

[9] *Supplicants* v. *Nimmo* (1627) M. 7740; *Renton* v. *Aiton* (1634) M. 7721; *Ogilvie* v. *Ker* (1664) M. 7740; *Irvine* v. *Forbes* (1676) M. 7722.

[10] *Wood* v. *Moncur* (1591) M. 7719.

[11] See generally Gloag on *Contract*, 2nd ed., esp. pp. 68 *et seq.* and pp. 234 *et seq.*; also a most valuable article by Lord Normand "Consideration in the Law of Scotland," 55 L.Q.R. 358 at pp. 365 *et seq.*

[12] 1920 S.C.(H.L.) 195; 1920, 2 S.L.T. 285.

It is necessary to examine more fully that aspect of the doctrine of *jus quaesitum* which is concerned with the title of the *tertius* to sue the *debtor* in the obligation if he declines to perform his undertaking at all, or fails to tender satisfactory performance. So far as the right of the *tertius* to sue the promisor (debtor) is concerned, it is sufficient that the latter has bound himself by his own promise. Such a promise needs no acceptance by the *tertius*, and in principle is fully enforceable—both for decree of specific implement and also, it is submitted, for damages.

To maintain his action, however, against the debtor in the obligation the *tertius* must establish that *both* principals in the contract intended to confer on him a right to sue. Where the contract is a written one, this is a question of interpreting the language used. The clearest case is where an express right to sue is conferred by the contracting parties on a third party. In such a case he can sue, even though no personal benefit accrues to himself—*Dickson* v. *National Bank.*[13] If, moreover, in a contract between A. and B., both agree that B., the debtor in the obligation, will do or pay something for the behoof of C., C. can enforce his right as *tertius*, even though A. also retains a substantial interest under the contract—as in *Lamont* v. *Burnett,*[14] where the purchaser of a hotel was held bound to pay to the vendor's wife the sum of £100 which he had promised to pay in addition to the purchase price of £7,000 payable to the vendor. In a contract between A. and B. which contemplates conferring a benefit on a *tertius* it is not, of course, necessary that C. should have been described by name—*Peddie* v. *Brown.*[15] He may be one of a class, *e.g.*, " successors," and, indeed, may not be in existence when the original contract is made —*Magistrates of Dunbar* v. *Mackersy.*[16]

Whether a third party may sue on a contract where title has not been expressly conferred depends on the intention of the contracting parties. As Lord Kincairney put it in *Taylor* v. *R. H. Thomson & Co.,*[17] " The mere fact that he is not mentioned in the contract is not conclusive. . . . But it is, I apprehend, essential to the establishment of a *jus quaesitum tertio* that it shall appear that the contract was entered into with a view to the benefit of the third party claiming to have that right; that the contracting parties intended that he should have that benefit, and contracted for him." As regards the " intention to benefit " arising under the agreement of the contracting parties, Gloag[18] observes concisely, " Was their object, in entering into the contract, to secure a benefit to a third party, or was the benefit which the fulfilment of the contract would secure to a third party merely the incidental result of an advantage which one or other of them proposed to secure to himself?"

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[13] 1917 S.C.(H.L.) 50; 1917, 1 S.L.T. 318. Is this, however, a proper use of the expression *jus quaesitum tertio?*

[14] (1901) 3 F. 797; 9 S.L.T. 39.

[15] (1857) 3 Macq. 65, *per* Lord Cranworth L.C., at pp. 70–71.

[16] 1931 S.C. 180.

[17] (1902) 9 S.L.T. 373 at p. 374.

Where no substantial personal benefit is reserved by the party stipulating for performance, the courts will readily construe the agreement as having been intended to benefit the *tertius* who alone has an interest in the fulfilment of the contract. The *tertius* whose title is thus recognised may be an individual or a member of a particular class. Thus in *Morton's Trs.* v. *Aged Christian Friend Society*[19] it was held that an offer made to and accepted by a member of a provisional committee that a philanthropist would subscribe to a charitable society, if it should be formed, conferred a *jus quaesitum* on the Society when it eventually came into being. Though no express title to sue had been conferred, the Society had the sole interest in the fulfilment of the agreement.[20]

Again, in *Wood* v. *Moncur*,[21] a tenant on an estate was held entitled to sue on a contract between life-renter and fiar which was designed to benefit the tenants generally. Likewise in *Love* v. *Amalgamated Society of Lithographic Printers*,[22] where the rules of a trade union provided for the payment of benefits to dependants of members who became insane, it was held that the executive could not exercise their power to alter the rules so as to defeat a *jus quaesitum* which the dependants of a member had acquired on his becoming insane. Another case in point is *Rose, Murison & Thomson* v. *Wingate, Birrell & Co.'s Tr.*,[23] where it was held that guarantees exacted by an association of underwriters in respect of underwriters' liabilities gave a *jus quaesitum* to persons insuring through brokers who were also members of the association.

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[18] p. 235.

[19] (1899) 2 F. 82; 7 S.L.T. 220.

[20] It may be noted that the reference to this case in Gloag on *Contract*, 2nd ed., p. 237, note 8, by mistake gives the date as 1889, which presumably accounts for the description in note 7 of a case decided in 1897 as " subsequent " to *Morton's Trs.*

[21] (1591) M. 7719.

[22] 1912 S.C. 1078; 1912, 2 S.L.T. 50.

[23] (1889) 16 R. 1132.

It must be stressed that the right to sue on a contract concluded between others is not conferred on any person who is merely " interested " in the fulfilment of that contract, and the courts will not construe a *jus quaesitum tertio* out of a contract where the effect would be to confer a right upon the public generally. Thus in *Finnie* v. *Glasgow & S. W. Ry.*[24] a member of the public was held to have no right to enforce a rate of tolls agreed by two railway companies in their own interests. The fact that it may cause financial detriment to an individual that others should not implement their private agreements confers no right to sue. The trend of decisions indeed—contrasting with the scope of the *jus quaesitum tertio* on the Continent—is against construing contracts so as to confer rights on third parties to sue on them, if such contracts do not expressly confer title on the *tertii*, or operate for their exclusive benefit as individuals or members of a class. Accordingly, if the person who has stipulated for performance retains a substantial interest himself, this will go far to exclude the implication that the contract contemplated the conferring of a right on the *tertius*. Where express language is used, then the problem of interpretation need not arise.

In certain of the old cases reported in Morison's *Dictionary*, *e.g.*, *Ogilvie & Grant* v. *Ker*,[25] creditors of a vendor were held to have a *jus quaesitum* against a purchaser who, having agreed with the vendor to apply the price in discharge of the latter's debts, later paid the price direct to the vendor. The recent cases are less favourable to such a construction. In *Henderson* v. *Stubbs*,[26] where a new company took over the business of another company and undertook to pay all its debts, this was held to be for the convenience of the two companies and not to confer any right to sue upon persons who sought to recover damages for libels published by the old company. Where, however, goods are transferred from a purchaser to a third party with the condition that the latter shall relieve the former of payment to the vendor, the vendor, if the arrangement is intimated to him, will seemingly acquire a *jus quaesitum*: *per* Lord Fullerton in *Leslie* v. *Mags. of Dundee.*[27] (There are specialities in this case which involved a claim for remuneration of services.) Whereas a contract of indemnity will not as a rule be construed as conferring rights upon creditors, there is room for a distinction between general contracts of indemnity and cases where the creditor in an existing claim is led, as by intimation, to look for satisfaction thereof to one who contracts with his debtor.

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[24] (1857) 3 Macq. 75.
[25] (1664) M. 7740.
[26] (1894) 22 R. 51; 2 S.L.T. 288.

The fundamental question, however, is one of construction—Did the contracting parties intend to confer a title to sue on a third party? Somewhat complicated rules have been laid down by the cases for enforcing building restrictions between co-feuars or disponees—(see *Hislop* v. *MacRitchie's Trs.*[28]; *Nicholson* v. *Glasgow Blind Asylum*[29] and *Braid Hills Hotel Co.* v. *Manuels*[30]). It would not be appropriate in this paper, however, to expand on this somewhat technical aspect of the law of Scotland, except to observe that, as a disponer parts with his entire interest on sale, it would be more readily presumed in the case of disponees than of co-feuars that, if building restrictions were imposed on them, these were to be enforceable by other persons interested in the preservation of the amenities similarly bound.

It is now necessary to consider the limits of contractual liability to third parties in cases where it can be established that the parties to the original contract intended to confer enforceable rights on *tertii*. Naturally there are cases where, quite apart from the contractual relationship, there may be liability to third parties in delict. Thus, where a doctor enters into a contract with a husband to treat his wife and the doctor treats her negligently, he will be liable to the wife in an action for reparation irrespective of the contract with the husband—*Edgar* v. *Lamont*.[31] Moreover, a man who undertakes a contractual duty, say, to repair a lift or vehicle may extend the duty of care which he owes to third parties in reparation.

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[27] (1840) 3 D. 164.
[28] (1881) 8 R.(H.L.) 95; [1881] 6 A.C. 560.
[29] 1911 S.C. 391; 1911, 1 S.L.T. 37.
[30] 1909 S.C. 120; 16 S.L.T. 523.

Unfortunately the limits of duties of care arising *ex delicto* have too often been confused with the limits of duties arising from consent. In principle, though agreement may extend or restrict duties of care owed to persons relying on the contract—and may indirectly, by widening the scope of foreseeable consequences, increase the duty of care owed in reparation to strangers to the contract—the ordinary duties of care in reparation cannot be excluded or restricted by agreements to which those injured have not assented. If, of course, by contract between A., an occupier of premises, and B., a contractor, it had been agreed that C., B.'s workman, should have a right to enter only on accepting certain risks, then since C.'s right of entry and the duty of care owed to him would arise by acceptance, the *jus quaesitum* created by the contract between A. and B. might well restrict the duties which would be implied by the ordinary law of negligence.

The *non sequitur* that because A. owes a duty in contract to B. he cannot owe a further duty to C. in reparation quite independent of contract, appears in several nineteenth and twentieth century Scottish cases in which the judges were probably influenced by English notions of privity.[31a] By contrast, the earlier Scottish cases seemed to reflect—even though the judges may not have fully appreciated the implications—the logical sequence of liability laid down by Stair, *viz.*, that obediential obligation (including reparation) is logically antecedent to consensual obligation and may have a wider scope. Moreover, the older Scottish law was prepared to grant redress for financial harm resulting to persons injured by the negligent conduct (including professional negligence) of defenders who owed no *contractual* duty to the pursuers. Thus in *Blair and Allan* v. *Peddie*,[31b] the defender was held liable for the amount due under a bond which had been annulled because the defender, who had signed as witness to a signature, had not actually seen the principal party subscribe. In *Lillie* v. *MacDonald*[31c] also, a law agent was held liable in reparation to persons prejudiced by his failure to intimate a bond; and in *Goldie* v. *MacDonald*,[31d] a factor was held liable to a widow for damages representing what she had lost through his failure to secure confirmation of her late husband as executor—which he had been employed by the husband to do. In *Dougan* v. *Smith*,[31e] the defender was held liable for his negligence in causing the pursuer's civil debtor to be released. In *Lang* v. *Struthers*,[31f] a law agent was held liable to persons prejudiced by his negligent actings.[31g] These cases can be contrasted with the later decisions such as *Goldie* v. *Goldie*,[31h] in which a widow's claim against a

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[31] 1914 S.C. 277; 1914, 1 S.L.T. 80. It may be observed that this case, and the fact that *Cameron* v. *Young*, 1907 S.C. 475; 14 S.L.T. 739, aff. 1908 S.C.(H.L.) 7; 15 S.L.T. 976; and *Cavalier* v. *Pope* [1906] A.C. 428 were cited in argument, show that the Scottish law of reparation was being influenced strongly at this time by English notions of privity of contract.

[31a] *Campbell* v. *A. & D. Morrison*, (1891) 19 R. 282; *Warwick* v. *Caledonian Ry.* (1897) 24 R. 429; (1897) 25 R.(H.L.) 1—injury to workmen through alleged negligence of defenders whose contract was with others; *cf. Traill & Sons* v. *Actieselskabat Dalbeattie, Ltd.* (1904) 6 F. 798; *Cameron* v. *Young*, 1907 S.C. 475; 1908 S.C.(H.L). 7—remedy refused to wife and children of a tenant who had been

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injured due to the dangerous condition of the subjects let. So far as the action was based on the contract of lease, the pursuers were rightly held to have had no title to sue, though some continental systems might have implied a *jus quaesitum* in the circumstances. Dicta of the House of Lords, however, following *Cavalier* v. *Pope* (1906) A.C. 428, denied that the pursuers could have any remedy even in reparation. See also *Young* v. *Campbell*, 1924 S.C. 157 at p. 162, and *Shillinglaw* v. *Turner*, 1925 S.C. 807 at p. 820.

[31b] (1684) M. 13942.

[31c] December 13, 1816, F.C.

[31d] (1757) M. 3527.

[31e] July 3, 1817, F. C. (though there may be an element of contract in this case).

[31f] (1826) 4 S. 418; (1827) 2 W. & S. 563.

[31g] Though this case has subsequently been explained on the basis that the agent acted "for the behoof" of the pursuers, who therefore had a contractual claim, it is doubtful whether in fact "for the behoof of" was construed by the judges in *Lang* v. *Struthers* as giving rise to *a jus quaesitum* at all.

[31h] (1842) 4 D. 1489.

law agent in respect of his negligence failed—though his negligence was the indirect cause of her claim to terce failing. Since she would not have been thus prejudiced had she not renounced her marriage contract provision in order to claim terce, it may well be thought that the damage would have been regarded as too remote in any event, quite apart from the fact that there was no contractual relationship between the widow and the law agent. Subsequently, of course, in *Robertson* v. *Fleming*,[31i] *Williamson* v. *Begg*,[31j] and *Tully* v. *Ingram*,[31k] the view hardened that a law agent could only be sued for professional negligence by those who had employed him. All these authorities, however, have really nothing to do with the *jus quaesitum tertio* at all—though they are frequently cited for the view that a *tertius* cannot sue in contract for general damages in respect of the negligent performance by the promisor of his obligation.

In the cases analysed in the preceding paragraph, with the possible exception of *Lang* v. *Struthers* alone, the defenders had not made any enforceable promise to the pursuers who had suffered damage by their negligence. There was at most a claim *in reparation* in respect of the defender's failure to exercise reasonable care to avoid harm to the pursuers, who he should have foreseen might be injured by his negligence. These cases are comparable with *Candler* v. *Crane Christmas & Co.*[31l] in English law. They were cases in reparation. If the cases in which the pursuers failed are treated as authorities on contract or pollicitation, the pursuers failed deservedly, because there was no consensual nexus with the defenders at all. Only if the defenders had promised to act for the pursuers would the *jus quaesitum tertio* have been a relevant consideration. Whether the pursuers should in each case have failed on a claim based on *culpa* is still debatable. It may be noted, without developing the point, that the categories of negligence in Scotland are not yet necessarily closed so far as professional actings and negligent misstatements are concerned. Indeed, the older authorities favour such claims. Certainly there would seem to be no reason why a pursuer should not recover all the amount of his financial loss as well as his damages for physical injury in a Scottish action based on negligence. The fact that the English common law does not extend so far is not conclusive of the matter.[31m]

[31i] (1861) 4 Macq. 167.

[31j] (1887) 14 R. 720.

[31k] (1891) 19 R. 65.

[31l] [1951] 2 K.B. 164.

So far as the writer is aware there has been no adequate juristic analysis in Scotland of the nature of the right conferred on the *tertius* by the *stipulatio alteri.* The question has been much discussed by Continental writers and in South Africa.[32] Hitherto it has been suggested by several writers that "acceptance" by the *tertius* creates a contractual obligation between him and the debtor under the original contract. But, if the stipulator A. is merely a medium for transmitting rights and duties between B., the debtor, and C., the *tertius*, then the position would resolve into one of agency—whereas the true relationship of parties in the *stipulatio alteri* is a triangle. Consequently, the trend of certain modern commentators on the French civil code[33] postulates a different interpretation—namely, that the right of the *tertius*, C., springs directly from the contract between A. and B., but is not a right *ex contractu.* Indeed, unless the object of the original contract is to extinguish a debt owed by A. to C., the right of the *tertius* in the *stipulatio alteri*, it is said, closely resembles the right of a donee in donation. It is submitted that while this concept of indirect donation may be useful in assessing the juristic position in Scotland so far only as the relationship between stipulator and *tertius* is concerned,[34] the analogy must not be pressed too far. Prior acceptance of a benefit is not necessary to complete donation, nor is it required to complete a valid *jus quaesitum* in Scottish law—though, of course, no man can have a benefit forced on him against his will, and his refusal would be resolutive of his title. On the other hand, unlike cases of true donation, delivery to the *tertius*, or to another on his behalf, is not an essential element to constitute a *jus quaesitum* (see Lord Dunedin in *Carmichael* v. *Carmichael's Ex.*[34a]) Moreover, in certain cases the benefit which the stipulator confers on the *tertius* may be in discharge of an antecedent debt owed by the stipulator to the *tertius*, and thus not in fact gratuitous.

[31m] Now, it is thought, do the decisions in *Manners* v. *Whitehead* (1898) 1 F. 171 and *Robinson* v. *National Bank*, 1916 S.C.(H.L.) 154 and *Boyd & Forrest* v. *Glasgow & S.W. Ry.*, 1915 S.C.(H.L.) 20, where the question of negligence was not really considered. *Cf.* Erskine 1.13.3. also *Nocton* v. *Ashburton* [1914] A.C. 932, *per* Lord Dunedin at p. 962, and Lord Shaw at p. 971. See D. I. C. Ashton Cross, 63 J.R. 199 and Smith "Development of the Laws and Constitution of Scotland," pp. 1123–1124.

[32] See esp. Thesis of Prof. J. C. de Wet, Leiden, 1940.

[33] See discussion in the authorities cited in notes 1 and 5.

[34] In Scots law the right of the tertius against the promisor undoubtedly arises *consensu*.

The *jus quaesitum* in Scotland gives rise, it is thought, to a triangle of rights and duties between stipulator, promisor and *tertius*, and the right of the *tertius* against the promisor is clearly a direct and not a derivative right. Though the right of the *tertius* may not become absolutely vested till a later date,[34b] the triangle of relations is created from the time when the stipulator contracts with the promisor *in favorem tertii.* The promisor is then bound to perform his obligation to the third party contemplated in the contract unless the stipulator subsequently exercises his option (before the *tertius* acquires an indefeasible interest) to make himself or some other person the beneficiary of the obligation. If the *tertius* never acquires a vested right, the promised performance would normally—questions of *delectus personae* apart—be exigible by the stipulator. Even the stipulator could not revoke the contract *in toto* against the wishes of the promisor. In Scottish law a promise (pollicitation as contrasted with offer) creates an enforceable, *consensual* obligation; and the *tertius*, if he has fulfilled the conditions prescribed to qualify for the benefit, is free to enforce it against the promisor as soon as the agreement has been given external effect in some manner recognised by law—as by delivery or intimation. The promise enforceable by the *tertius* would seem not to be a joint promise of stipulator and promisor, since, if there were failure of performance by the promisor, the *tertius* could not claim the promised benefit direct from the stipulator.

[34a] 1920 S.C.(H.L.) 195 at p. 919.

[34b] *e.g.*, *Morton's Trs.* v. *Aged Christian Friend Society* (1899) 2 F. 82; 7 S.L.T. 220.

It must now be argued that there is no sound reason in Scots law to restrict, as narrowly as some learned authorities have suggested, the right of the *tertius* against the debtor (promisor). They seem to confuse the relationship of the parties when they virtually restrict the rights of action of *tertius* against debtor to those of a donee against a donor; and also confuse rights in reparation with rights created by consent. In the *stipulatio alteri*, even though the debtor's obligation to the *tertius* may proceed from his unilateral expression of will, this is no ground in Scots Law for limiting its effect. Further, it is usually the stipulator who is the quasi-donor. The debtor may well have received substantial consideration from the stipulator as an inducement to undertake the obligation to the *tertius*. Especially if the stipulator retains no interest himself, it is not self-evident why the party who has taken some advantage as consideration for binding himself to perform should not be answerable for full and satisfactory performance of the obligation undertaken to the one person interested—the *tertius*. It is with some diffidence that the present writer differs from previous assessments by Scottish writers of the rights of the *tertius* against the debtor who fails to implement his undertaking to the stipulator. The leading work on contract in Scotland[35] observes: " A person who undertakes duties under a contract, and by failure to fulfil them properly causes loss, is not liable on the contract to a person with whom he did not contract, but on whom the loss has happened to light; . . . all attempts in such cases to infer liability on the principle of *jus quaesitum tertio* have failed. That principle, though it may entitle a *tertius* to sue on nonfeasance of a contract, will not entitle him to damages for misfeasance, because the real foundation of his title to sue is that the debtor in the contract has agreed to be liable to him, and it is not to be presumed that the debtor in a contract has agreed to be liable to a *tertius* in respect of his defective performance." Similarly Gloag and Henderson [36] lay down: "It has been authoritatively stated that although a third party may have a title to enforce an obligation under a contract he can never have any contractual right to sue for damages for the defective performance of a contract." Both works quote in support of their statements the cases of *Robertson* v. *Fleming* [37] and *Tully* v. *Ingram.*[38]

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[35] Gloag, p. 239. Gloag's views are also reproduced by Professor Walker in his treatise on *Damages*, p. 87 (published in 1955).

It is submitted with respect that, though both the cases cited—so far as they were concerned with consensual obligations—were correctly decided on their facts, it is quite unjustified to draw from them the broad propositions just quoted. *In limine* the distinction drawn between misfeasance and non-feasance has a somewhat unauthentic ring in Scottish jurisprudence. Lord Normand in an article contributed to the *Law Quarterly Review*, has observed [39]: "There is not a trace in our law nor in its known history of the procedural fictions . . .: nor, I may add parenthetically, is there any trace of any distinction between non-feasance and misfeasance. . . ." Secondly, the reason offered by Gloag why the debtor should not be liable for defective performance is—as a general proposition—quite unconvincing. What if a particular standard of performance had been expressly agreed at the time of contract and if it had been promised expressly that the *tertius* might enforce this standard? In any event, however, surely the promise made by the debtor to the *tertius* contemplates normal contractual standards of performance.

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[36] *Introduction to the Law of Scotland*, 5th ed., p. 92.

[37] (1861) 4 Macq. 167.

[38] (1891) 19 R. 65. See also *Raes* v. *Meek* (1888) 15 R. 1033, aff. 16 R.(H.L.) 31; *cf. Goldie* v. *Goldie* (1842) 4 D. 1489, discussed at pp. 12–13, *supra.*

[39] 55 L.Q.R. 358 at p. 361.

Can it seriously be suggested that the debtor in the obligation would be bound to deliver goods of merchantable quality to a purchaser, but not to a *tertius* for whose benefit another had stipulated?

The two cases on which the statements quoted are based were somewhat special. In each an attempt was made by persons disappointed through the negligent professional services of a law agent (employed by another) to sue that law agent. In both cases the pursuers failed, and it is considered justly so—so far as the principles of consensual obligation are concerned. The law agent owed the contractual duty to use professional skill to his employer—not to strangers, even though they would benefit by his efficiency and lose by his negligence. (The relation of law agent and client is particularly intimate and personal; and even in reparation apparently now implies no duty to strangers.) It must be stressed that in neither case cited had the employer of the law agent stipulated that the agent should render services to or confer any right or property of his own on the third parties. It was not the agent's property which was to be bought or taken in security, nor was he engaged as adviser to the pursuers. In each case the alleged *jus quaesitum* was collateral and incidental to the main transaction, and did not arise out of any "vested right absolutely acquired by a consummated transaction."[40] Indeed, it is difficult to conceive that the defenders (the negligent law agents) could have been sued by the pursuers for non-feasance if they had failed to act at all. If this is conceded, it is dubious whether any distinction between non-feasance and misfeasance can really be drawn from these cases. Strictly, the judges in *Robertson* v. *Fleming* only concerned themselves *obiter* with the question of *jus quaesitum*.

On principle it seems to the writer that no arbitrary rule should restrict the *tertius* from enforcing "a vested right absolutely acquired by a consummated transaction "—whether that right be to goods, money or services. It may be observed, moreover, that a claim for damages may be the only redress even for non-feasance where the obligation is one of the rare type in respect of which the Scottish courts will not decree specific implement. Suppose A. has an aged mother, C., and, being about to emigrate, gives to his sister, B., £1,000 on her undertaking to take C. into her house and care for her during the rest of her days. If, later, B. tired of the arrangement and fell out with C., the latter could presumably not get the court's assistance to maintain so personal a relationship by decree of specific implement. Could she recover damages in lieu?

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[40] See *Robertson* v. *Fleming*, *per* Lord Chelmsford, at p. 210, and *per* Lord Chancellor Campbell, at p. 177.

If the *stipulatio alteri* is for delivery of goods, there seems no reason why the *tertius* should not be entitled to goods of merchantable quality and delivery within a reasonable time—though it need not be considered that he should be vested in the contractual rights conferred by the Sale of Goods Act upon a purchaser. The relationship between promisor and *tertius*, though arising *consensu*, would not be the relationship of seller and purchaser.[41] The *tertius*, as is suggested, has a general claim for damages for the loss sustained by him due to faulty performance by the debtor of his contractual obligations. There is one case decided in the Sheriff Court, and therefore not binding on the superior courts, where the *tertius* recovered from the debtor charges incurred in respect of goods consigned. The facts in this case[42] were that goods had been purchased as a gift for the pursuer who was in India. The sellers undertook to forward the goods to the *tertius* (who knew nothing of the gift). The sellers omitted to send the bill of lading to the pursuer, with the result that the goods lay unclaimed for a period of time, and charges were incurred in consequence. The Sheriff held that the *tertius* (the pursuer) was entitled to recover the amount of these charges from the defenders (the sellers and consignors).

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[41] See *Helby* v. *Matthews* [1895] A.C. 471; Gloag, p. 36.

[42] *Cullen* v. *McMenamin, Ltd.*, 1928 S.L.T.(Sh.Ct.) 2.

The view expressed by Gloag and quoted above would apparently deny redress if inferior goods, inefficient service, or bad workmanship were foisted on the *tertius*—which could scarcely be the intention of the contracting parties nor the meaning of the obligation undertaken to the *tertius* by the promisor. Indeed, to go the whole way in dissent, it seems to the writer not unreasonable to suggest that there may be cases where a law agent could become liable to a *tertius* by means of the *stipulatio alteri*. Consider the case of A. whose friend C., visiting from abroad, has brought no surplus money with him. C. may wish or be compelled to secure professional legal advice in unforeseen circumstances. If A. goes to B., a solicitor, deposits £100 on account, and agrees with B. that the latter will advise and act for C., then it is submitted that C. should have a good claim against B. if the latter fails to render in a satisfactory manner the professional services stipulated for by A. Such a case would differ essentially from cases like *Tully* v. *Ingram*,[43] because in the hypothetical case the professional services to be rendered to the *tertius* would be the actual subject-matter of the contract.

It is accepted in Scots law that general damages may be awarded for breach of a unilateral and gratuitous promise in cases where the *jus quaesitum tertio* is not under consideration. The most familiar example possibly is breach of a promise to keep open an offer for acceptance within a particular time.[44] It is difficult to appreciate why in principle the preliminary intervention of a stipulator to secure the promise *in favorem tertii* should reduce the liability of the promisor to the promisee (*tertius*) when the promisee claims by virtue of a *jus quaesitum tertio*. Indeed any such distinction seems quite inconsistent with those doctrines of consensual obligation which were recognised in Scotland even before Stair restated them. Since the promisor in the *stipulatio alteri* relationship may well have accepted some consideration from the stipulator, it would be surprising if his liability to the promisee were less in such a situation than if he had merely spontaneously and gratuitously promised some benefit to the promisee. It is highly significant that the section in Stair dealing with the *jus quaesitum tertio* (I.10.4.) follows immediately upon his section (I.10.3.) dealing with the full enforceability in Scottish law of unilateral promises irrespective of prior acceptance. Indeed Stair apparently regards the *jus quaesitum tertio* as the leading example of promises which the law of Scotland enforces without requiring prior acceptance or consideration. There is at present clear need for Scottish lawyers to re-examine the authorities on *jus quaesitum tertio* in the light of underlying principles.

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[43] (1891) 19 R. 65.

[44] See *Marshall* v. *Blackwood*, 1747 Elchies *voce* Sale No. 6; *Littlejohn* v. *Hadwen* (1882) 20 S.L.R. 5, appr. Lord Dunedin in *Paterson* v. *Highland Ry.*, 1927 S.C.(H.L.) 32 at p. 38; Gloag, *Contract*, 2nd ed., pp. 35–36.

T. B. SMITH.

NULLA POENA SINE LEGE

IT is contended in this article that the maxim *nulla poena sine lege,*[1] regarded by Continental lawyers as a safeguard of liberty, is now applicable to Scotland and that no act can be punished as criminal unless known to be such by established law. Notwithstanding statements in our textbooks to the contrary, it is submitted, with great respect, that the High Court of Justiciary no longer has an inherent power to invent new crimes by punishing all conduct thought to be *malum in se.* Whatever the discretionary powers of our courts may once have been, it is believed that they are now confined to stigmatising only such conduct as criminal, (1) which is in contravention of a penal statute, (2) which constitutes an established crime at common law, and, (3) which, if there is no precise precedent in point, clearly falls within a determined principle of criminal wrongdoing. If this be so, the maxim *nulla poena sine lege* can be said broadly to apply to Scotland although our criminal law is not so precisely defined as in the Continental codes. The main features of the maxim are satisfied, and there is no ultimate overriding discretion to condemn conduct as criminal upon the basis of extra-legal considerations.

It has been pointed out[2] that the maxim referred to really involves four separate notions: (1) that the categories of the criminal law should be determined by general rules; (2) that a person should not be punished except for conduct falling within these rules; (3) that penal laws should not have retrospective operation; and (4) that penal statutes should be strictly construed. The last of these notions has long been one of our rules for the interpretation of statutes.

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[1] Or *nullum crimen sine lege* as it is sometimes written.

[2] Jerome Hall, 47 *Yale Law Journal* 167. And see Jennings, *Law and Constitution*, 3rd ed., p. 50; also Paton's *Jurisprudence*, 2nd ed., p. 311, where the learned author advocates that the maxim should be adopted strictly "so far as we are concerned with the determination of the limits of criminal conduct."

And if the powers of the High Court are now limited as suggested in the previous paragraph it will be seen that all the other possible conditions are satisfied. But if the courts still retain an inherent power to punish conduct not previously known to be criminal, as our textbook authorities maintain, the maximum *nulla poena sine lege* cannot be said to apply in Scotland. It will be contended, however, that the views of our textbook authorities must now be regarded as qualified and that there is no modern authority to support the wider doctrine. Indeed it is believed that the last occasion on which the High Court of Justiciary created an entirely new crime was in 1838.[3] All supposed later exercises of this overriding power are found on closer scrutiny to be the mere stigmatising of conduct as criminal where, although there was no precise precedent in point, there was nevertheless a determined principle of criminal law.

If the wider power has not been exercised for over a century the suggested application of the maxim *nulla poena sine lege* can hardly be regarded as likely to destroy the flexibility of our criminal law[4]; for the law has developed considerably during this period. If it were likely to do so this would certainly be an argument against its application, for it is this very flexibility of our system (embodied mainly in judicial decisions unlike its English counterpart) which has enabled it to keep abreast of the times without the confusing and sometimes stultifying English influence of the House of Lords.[5] But the qualified judicial power to develop the law along established principles is surely now sufficient for most purposes and, indeed, is never questioned in the civil courts where judges have now no power to invent entirely new rights and duties. Wide innovations are for the legislature.

It may be said that the legislature is too slow in passing statutes dealing with Scots law. But if such criticism of Parliament be well founded it should surely be directed towards improvement of the Scottish legislative process (and, in particular, its initiating machinery)—rather than be expended in a vain attempt to resuscitate an obsolescent law-making function of our courts which, under modern conditions, they are hardly suited to fulfil.

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[3] *H.M. Advocate* v. *Greenhuff* (1838) 2 Swin. 236, see *infra*.

[4] See, however, Houldsworth, 37 L.Q.R. 467.

[5] *Vide* the greater flexibility of the Scots law of murder as revealed in comparison with the English in the Report of the Royal Commission on Capital Punishment.

It is this concern with the true province of the modern judicial function under a developed system of representative government that leads one to reject the wide discretionary power on grounds of jurisprudence and constitutional law. It is submitted that with the virtual separation of the legislative and judicial functions of government it is no longer the province of judges to hold conduct to be criminal for the first time, merely because they consider it to be dangerous to the community or contrary to the public welfare. In the past judges were able to do so and over the centuries principles of criminal law deriving from their decisions have arisen to cover most forms of obviously immoral conduct and, in particular, most forms of wilful injury to person and property. It is the field of acts hurtful to the public at large, however, which remains partly uncharted and where it is felt that legal innovation should now be left (as indeed it appears to be in practice) entirely to Parliament. Law-making of this nature normally involves extra-legal considerations and consequences which cannot be properly considered or debated in a law court.

There is a further objection to the judicial invention of new crimes, namely, that it involves retrospective law-making. Due to the nature of our legal process this legislative power can only be exercised at the stage of legal debate on the relevancy of the complaint or indictment. Under our criminal procedure the public prosecutor must first serve an indictment or complaint upon the accused person. No *nomen juris* is strictly required but the facts libelled must be such that, if proved, they are relevant to infer a crime according to law. The accused may not have thought that what he did was strictly criminal and it is only when he challenges the relevancy of the indictment and the judge holds the charge relevant, that he knows for the first time that what he did was indeed punishable and a new crime has been created. This, in effect, unjustly makes the judicial introduction of crimes always retrospective—although Parliament hardly ever passes retrospective penal legislation.

It is accordingly when the relevancy of a criminal charge is challenged that a judge has first to decide whether a new type of conduct is criminal and the decided cases, to which reference will presently be made, are usually decisions upon relevancy. If not, they are of less value as authorities in the present context.

First, however, we must refer to the textbook authorities commencing with Baron Hume's work on *Crimes.*[6] The learned author states the court's power to create new crimes (which certainly existed in his day) in its widest terms. He describes it as distinguishing the Scottish from the English legal systems where he says the courts have no power to punish new crimes or modes of transgression until some statute has declared them to be criminal.[7] Then, he continues, "our supreme criminal courts have an inherent power as such competently to punish (with the exception of life and limb)[8] every act which is *obviously of a criminal nature*[9]; though it be such which in time past has never been the subject of prosecution." Hume then describes this power as advantageous, firstly, because new types of criminal conduct can be repressed more quickly and effectively than they ever can be by statute and, secondly, because a new crime, being censured on its first appearance and before it has become alarming to the community, can be restrained by milder correctives.

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[6] Hume on *Crimes*, Vol. 1, p. 12 (3rd ed. 1829), with Bell's Notes as Supplement, 1844.

[7] Hume, however, appears to have misunderstood the powers of the English courts, see *infra*.

[8] The proviso seems doubtful; see footnote to 2 Swin., p. 263.

[9] The italics in all the ensuing quotations (except where otherwise indicated) are the author's.

Alison[10] has much the same to say and observes that "by the common law every new crime, as it successively arises, becomes the object of punishment, *provided it be in itself wrong, and hurtful to the person or property of others.*" He too contrasts the position with that of England where he says (more correctly than Hume) the powers of the English courts to declare new crimes do not extend in the general case beyond misdemeanours and all the serious crimes and almost all the modern offences are the subject of legislative enactments. The consequence, he continues, is that these English statutes, made on the spur of the moment, are characterised by undue severity. With some force he points out that the English criminal system in his day countenanced three hundred varieties of capital crime compared with only fifty in Scotland more than half of which had originated from the British Parliament.

One wonders, however, whether judges are always more lenient than Parliament. Certainly one chapter of the criminal law that owes its entire origin to judicial innovation is not a happy one and had to be subsequently altered by parliamentary enactment. The words of Lord Justice-Clerk Braxfield "Let them bring me prisoners and I'll find them Law!" are familiar, and certain it is that English and Scottish judges at the beginning of the nineteenth century, haunted by the fear of the French Revolution, deliberately created the crimes of combination or conspiracy to prevent the growth of working men's associations which they then regarded as *dangerous to the community.* When these so-called "conspiracies" to further what are now regarded as legitimate trade union purposes were accompanied by extortion or threats, as in the case of *William Mackinnie and Others* (March 12 and 13, 1813), there may have been some justification for conviction.[11] But where in the cases of Arthur Ferrier (March 16, 1813) and *Wilson and Banks*

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[10] Alison's *Criminal Law*, Vol. 1, p. 624 (published 1833).

[11] Cited in Hume on *Crimes*, Vol. 1, p. 495. The extortion and threats were, however, only libelled as an aggravation of what was otherwise held to be a crime.

(1818)[12] the accused were convicted for taking part in strikes for the purpose of increasing wages, without any threats or violence, the judicial decisions to convict seem difficult to defend. This novel form of crime was introduced without any legal precedent and solely on the ground that the judges regarded such conduct as *dangerous to the community.* This is precisely the type of conduct of a public nature, already adverted to, which it is nowadays not the province of the judiciary *ex proprio motu* to condemn.

Hume, however, as one would expect, cites these combination cases with approval and says[13] "This new point of dittay seems, therefore, now to be thoroughly established; and it furnishes another illustration of the character of our common law, and of its power to chastise, of its own native vigour, all the wrongs and disorders, as the state of society brings them forth, *which are found to be materially dangerous to the public welfare.*" The native vigour of our common law, however, had to be curbed in this respect by statute in 1825 (6 Geo. 4, c. 129, s. 4) when it was enacted that combinations of workmen were not illegal if not attended with violence or threats.

It is thought that even in Hume's day the wide discretionary power to create new crimes was fast becoming obsolescent. In earlier times when the purposes of government and the amount of parliamentary legislation were limited, there was more excuse for deliberate judicial law-making. Moreover, the further one recedes in legal history, the less and less can be the guiding precedents until one reaches a time of first decision and clear judicial innovation. But in a developed system of jurisprudence with the legislative and judicial functions of government divided between a representative Parliament and independent law courts, there is small excuse for deliberate judicial legislation. As already suggested there comes a time in the development of any legal system when most types of wilful injury to person or property will have been declared punishable and any further introductions to the criminal catalogue are likely to condemn conduct of a more public nature; in adjudging this to be criminal the court will probably be making a quasi-political decision or be setting itself up like Star Chamber as a court of public morals which it is not its modern function to fulfil.

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[12] *Ibid.*, p. 496.

[13] *Ibid.*, p. 496.

It is respectfully submitted that in the case of *H.M. Advocate* v. *Greenhuff and Others*[14]—the last occasion when the High Court introduced a new crime—it was setting itself up as a court of public morals and that the court's decision proceeded upon grounds which would be quite untenable at the present day. The case was heard before a full court of seven judges and only Lord Cockburn dissented from the majority opinion. The case is accordingly one of considerable importance. But if the opinions of the majority of judges in *Greenhuff* proceeded upon a rationale which has since become outmoded, there is recent authority in Scotland (where the strict doctrine of *stare decisis* has never been so rigorously applied as in England) that their decision need no longer be followed; *cessante ratione legis cessat lex ipsa.*[15] It is therefore necessary to inquire closely into the *ratio decidendi* of this case. But the present argument does not require to invite the direct overruling of *Greenhuff*, which must obviously remain an authority for what it in fact decided for the first time, namely, that the opening and keeping of a common gaming house is a crime at common law; it merely requires that the wider statement of the court's discretionary power existing in 1838 (and as described by Hume) be disapproved as no longer tenable under modern conditions.

The majority of judges in *Greenhuff*, without any direct principle or precedent of Scots law to guide them, were obviously tempted to arrive at the decision they did because the facts libelled constituted a crime according to the law of England. Certain statutes, moreover, governing the situation had been held inapplicable to Scotland at a previous hearing.[16] If their Lordships could not innovate upon the common law a new statute would probably require to be passed with all the delays notoriously attendant upon purely Scottish legislation.

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[14] (1838) 2 Swin. 236.

[15] *Macdonald* v. *Glasgow Western Hospitals*, 1954 S.C. 453, *per* Lord President Cooper at p. 478. Also his Lordship in *Beith's Trs.* v. *Beith*, 1950 S.C. 66 at pp. 70 and 72. See also "The Doctrines of Judicial Precedent in Scots Law" by Professor T. B. Smith, pp. 100–101.

The case, however, as libelled, was purely at common law and the full court of seven judges were faced with a clear decision on relevancy, namely, whether the opening and keeping of a common gaming house was a crime according to the law of Scotland—although it had never been charged as such before. In short, whether they had discretionary power in the widest sense expressed by Hume to invent an entirely new crime. How then, in the exercise of their judicial function, did their Lordships reach their decision?

In holding the libel relevant Lord Justice-Clerk Boyle [17] founded specifically upon the quoted passage in Baron Hume's work [18] and said it was of no consequence that the charge was now made for the first time. He said [19] "In determining whether or not what is here charged is a crime, we are bound to consider what the nature of a common gambling house of the description set forth in the indictment is—what are its effects—and what its consequences to the public at large." His Lordship then went on to recall the disgraceful scenes which to his knowledge occurred in some London streets and at the Palais Royal in Paris which led him without hesitation to conclude that "an establishment of this description within this city is so great an invasion of the rights of public morality, and threatens such evils to the public at large and to the particular community among whom it is sought to be introduced, as to be clearly cognisable by this court." In so doing he regarded himself as following English example and adopted the dictum of an English judge[20] that "any practice which has a tendency to injure the public morals is a common law offence." He also cited the conspiracy cases as illustrating "that this court has power to declare anything that has a tendency to corrupt public morals, and injure the interests of society, an indictable offence."

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[16] See 2 Swin. 128. The actual statutes were 12 Geo. 2, c. 28 and 18 Geo. 2, c. 34.
[17] *Ibid.*, p. 259.
[18] Vol. 1, p. 12.
[19] 2 Swin., p. 258.

Lord Meadowbank[21] found difficulty in arriving at the same opinion. Possibly he realised that a proper exercise of the judicial function now involves applying settled principles of law and not one's own unguided discretion. But he overcame this difficulty by appealing, like the medieval scholiasts, and in a manner which even Viscount Stair might have approved, to a higher law to which all positive law should conform, *viz.*, "The inherent power of this court to repress whatever are, by the law of God, and the laws of morality, *mala in se*." In a resounding final sentence he observed: "Religion is a part of the common law of England. Morality is a part of the common law of England. Our common law is based upon the same foundations. If, therefore, keeping a common gaming house of the nature described in this indictment is contrary to religion and morality—if an establishment of that kind is a *malum in se*—it must be an indictable offence by our common law in the same way as it has been found to be by the common law of England."

Lord Moncreiff shared Lord Meadowbank's initial doubts but said[22] it could not now be maintained that nothing was an indictable offence by the common law of Scotland which had not been so indicted before. There might be differences of opinion as to the extent of the principle enunciated by Hume or its application in particular circumstances, but the principle itself could not now be called in question. To do so, he believed, would run the whole criminal system into absurdity. "For the common law itself must have had a beginning." (The criticism of the latter argument is obvious and has already been stated.)

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[20] *Ibid.*, p. 262.

[21] Best J. in *Rogier* and *Humphrey* (1823) 2 Dowl. & Ry. 431.

[22] 2 Swin., p. 265.

Lord Mackenzie also expressed doubts and realised there must be some legal limitation upon the wide discretion of judges to punish every new act they chose to consider *malum in se*. He observed " It is too late for me to entertain any doubts that we must sustain a jurisdiction of this nature as inherent in the court. There are no doubt limitations within which the jurisdiction must be exercised. We are not, I think, bound to say that an act is punishable as a crime merely because it may be stated to belong to a class which may be made out, by refined process of speculative reasoning, to be noxious to society. It is the province of the legislature to prevent the commission of acts of this nature, by laws promulgated beforehand. In order to bring any act within the jurisdiction of this court, as a crime, I think the act must either in itself be so *grossly immoral and mischievous on the face of it that no man can fairly be ignorant of its nature, or it must have been so settled by a course of experience, and become notorious that such is its nature*. The case of sending threatening letters appears to me to come within the first category. I think that was one of the cases in which the act committed was such, that if it had never occurred before, *no man could doubt the wickedness and mischief the moment it was mentioned to him*. In this case, I am not sure that the nature of the offence is so grossly criminal at first." But his Lordship eventually decided, largely on the ground that gaming houses were regarded as " public nuisances " in England, that they were of an obviously criminal nature.

Lord Medwyn [23] is the only judge who joined the Lord Justice-Clerk in finding no difficulty at all in holding the libel relevant. After referring to some old instances of the court inventing new crimes he, however, qualified the power by saying, " I agree in thinking that this is a power which we should exercise with due caution, and only in cases where the criminal act complained of partakes of the character of a public nuisance, which means, as Lord Mackenzie very properly observed, what is *pernicious to society, proved to be so by invariable experience wherever there has been room for experience.*"

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[23] *Ibid.*, p. 269.

The consensus of opinion among the majority of judges in *Greenhuff* therefore appears to have been that the wide discretionary power to invent new crimes, as particularly described by Hume, was still subsisting; but that it should be regarded as qualified to some extent. Some considered the test of relevancy to be whether the acts libelled offended against the laws of God or morality, others whether they were *mala in se*. But these are not really legal tests. Only Lord Meadowbank tried to formulate a legal guiding principle akin to the test of the reasonable man when he said the conduct must be such that no man could doubt its wickedness and mischief the moment it was mentioned to him. This is, perhaps, the most acceptable of the suggested tests. But the difficulties of trying to confine such a wide discretionary power within some legal principle and of trying to express moral censure in legal terms are obvious. Indeed the judgments in *Greenhuff* present to the jurist an interesting insight into the true nature and limitations of the judicial process.

It is the dissenting judgment of Lord Cockburn, however, which is of the greatest contemporary interest. For his view of the law is now believed to have come into its own and to represent the modern outlook upon this important question. One may perhaps be permitted therefore to quote at length from his Lordship's opinion.[24]:

" Now, agreeing as I do with all of your Lordships as to the possible tendency of such places of resort, I have not been able to bring them within the operation of our common criminal law, so as to be indictable, without any statute or judicial precedent, in this court.

" There was perhaps a time in the history of this country, as there probably has been in the progress of all countries, in which courts were apt, or rather were obliged, to proceed in the declaration of crimes, upon nothing better than their own views of expediency. When the proper departments of the legislative and judicial powers are unsettled, and urgent evils require speedy remedies, and courts have little else to direct them than instinctive feelings of morality—this last ground for the interference of the judicial authority is made reasonable by being necessary. Courts are compelled to do whatever appears just and useful; and this is justified by being ascribed to the law of nature—the only light that they then have.

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[24] *Ibid.*, p. 271. The italics are his Lordship's.

" But there is a subsequent period in which this primitive state of things is changed. The limits of courts and of Parliament become defined—experience has brought out offences—courts have not only decided what shall be held to be criminal, but have established general principles to include new forms of delicts—and the public, in the case of any totally original criminal invention, is adequately protected by the legislature. After this, courts must proceed upon the precedents or the principles which the long, regular, practice of the law has introduced; and they are attempting a task for which they are ill calculated, and were never intended, when they are extracting new offences out of speculations of their own upon mere public expediency.

" No example of the occasional effect of this can be more admonitory than what is afforded by the case which occurred here not very long ago, when simple combination by workmen to raise wages was, for the first time, made the subject of indictment at common law. No case was ever disposed of by any court with greater deliberation; and I am not questioning the legality of the result. But the fact is, that there being no precedent, or any other direct and conclusive authority, the relevancy of the charge was discussed and sustained solely on the ground that the act was criminal, *because it was dangerous.* There was no other idea or view taken of the case on the Bench. Yet in the course of a very few years it was determined, as deliberately, by Parliament, that this was not only not dangerous, but that it might be meritorious, and was often necessary; and these concerts, instead of being kept under the ban, are now placed under the positive protection of the law. These unseemly discrepancies between the wisdom of judges and the wisdom of senators will always be occurring where courts, instead of walking upon strictly judicial principles or precedents, forestall the remedial superintendence of the legislature by yielding to the temptation which good minds must always feel, to avert supposed public inexpediency, or to punish clear moral delinquency by peremptory visitation on their very first appearance.

"In considering, therefore, in a correct legal age, whether any given act be an indictable offence, I am disposed to look narrowly at what the courts of law have done and not at what I may think that Parliament ought to do."

Lord Cockburn then went on to consider what precedent there was for regarding gambling in common gaming houses as criminal and concluded that there was no such precedent anywhere. He then continued: "In this situation, whatever may be my wishes, I can find no legal ground for *our beginning* now to add it to our criminal catalogue.

"It has been said that it is in the power of this court to declare, that is, to *introduce*, new crimes; and that if it be in our power, it is our duty to do so on fitting occasions. I dissent utterly from this doctrine; and, if a proper occasion for discussing it shall ever arise, I shall endeavour to explain why I do so. I may only say at present that I am far from holding that the court can never deal with any thing as a crime, unless there be a fixed *nomen juris* for the specific act, or unless there be a *direct precedent*. An old crime may certainly be committed in a new way; and a case, though never occurring before in its facts, may fall within the *spirit* of a previous decision, or within an established *general principle*. And such is the comprehensiveness of our common law that it is no easy matter for any newly invented guilt to escape it. But this is not the meaning of the doctrine, as usually announced, when it is said that this court can declare new crimes. There is no such declaration, nor the exercise of any extraordinary power needed, in the court's merely determining that an act that has never presented itself before *comes within the range of a known term, case, or principle.* The meaning of the doctrine is this—that although vice may invent a *totally original offence*—never heard of before—and for which law has not only no name, but which is not included within any known penal description or principle, *but which is in its whole nature entirely new*—still, *if it imply wickedness and be hurtful*, the Court of Justiciary, *treating it as an entirely unheard of thing*, may, in virtue of what is termed its '*inherent powers*,' introduce it as a new crime.

"*It is from this that I dissent.* I conceive the power ascribed to us to be inconsistent with the proper constitutional limits of any British court. I am aware of the opinion of Mr. Baron Hume, and of the weight due to it; but, *upon such a subject*, I care little for the theory, or the doctrine, of any modern institutional writer; or even for occasional *obiter dicta* from the Bench. I must see the power recognised by Parliament, or practised by the court *so long and so directly*, that the sanction of Parliament and the acquiescence of the public are implied. Now, I have never heard it stated that there is any Parliamentary recognition. On the contrary, almost every statute declaring a new crime (and of these there are far more, both before and after the Union, than is commonly supposed), is a virtual expression of the principle that the Supreme Criminal Court had no dormant power to do so. And except in the single, and very recent, case of combination I can discover no proceeding by the court directly resting on the exercise of this power. There are only two other cases ever referred to, *viz.*, that of *Gray*, in 1737, for sending a threatening letter, and that of *Wright*, in 1809, for child stealing." His Lordship then pointed out that these cases did not really create new crimes and combination was the only true recent example of deliberate judicial extension of the criminal code.

As Lord Cockburn was in the minority, one must also add the case of *Greenhuff* itself as a further example. But since *Greenhuff* there has been no clear exercise of the court's supposed discretionary power to invent new crimes and it would accordingly seem that the power has fallen into desuetude. It is believed that all more recent supposed examples are found on closer scrutiny to be mere illustrations of old crimes committed in a new way (to use Lord Cockburn's words) or of cases novel in their facts yet falling "within the spirit of a previous decision, or within an established general principle." It must, however, be conceded that there have been *obiter dicta* capable of different interpretation; the doctrine has certainly never been expressly overruled and in a recent decision[25] Lord Cameron expressly reserved his opinion upon the whole question. Moreover the only up-to-date textbook on Scottish criminal law still states the old doctrine in its widest form—although, it should be added, without altering the relevant passage in the first (1866) edition of Macdonald's treatise. Macdonald states[26] that "the jurisdiction of the High Court of Justiciary is not limited to crimes which are already established by the common law and to special statutory crimes. It has an inherent jurisdiction to punish *all acts which are plainly criminal*, although previously unknown and not within any statute."

For reasons already given it is thought with great respect that this statement of law must now be qualified to some extent and cannot nowadays be maintained in its widest form. For even the majority of judges in *Greenhuff* suggested some qualification. It is believed that Lord Cockburn's opinion now represents the law of Scotland and that it is only where conduct falls within an established principle of crime that it is punishable.

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[25] *Edward Martin and Others*, September 30, 1955 (so far unreported).

[26] Macdonald on the *Criminal Law of Scotland*, 5th ed., p. 193.

The passage referred to in Macdonald is supported in the footnote by other authorities besides Hume and *Greenhuff* and, in particular, it is stated that there are more recent cases which support the wider doctrine. With great respect it is submitted that all the cases there cited can be brought within the ambit of Lord Cockburn's dissenting opinion and are no real support for the wider proposition.

The first case cited is that of *Will Fraser* in 1847,[27] where the accused was charged with fraudulently and deceitfully obtaining access to and having connection with a married woman by pretending to be her husband. This new way of committing a fraud or indecent assault was certainly ingenious but was not in essence a new crime—merely a new way of committing an established crime. The relevancy of the indictment was not even challenged. Moreover, it is of interest to find that on a different page of Macdonald [28] the case is described as one of aggravated fraud. The next case of *Charles Sweenie* (1858) [29] is even less an authority in support of the wider doctrine. Here a man was *inter alia* charged with having carnal knowledge with a sleeping woman without her consent and not being her husband. All the judges (with the exception of Lord Cowan) described the case as a new species of indecent assault. Lord Ardmillan says " it is an act of the character of an indecent assault and is really not a new crime, but only a new form of crime, falling within the scope of an old and established principle." Lord Dees (p. 146) appeared openly prepared to accept Lord Cockburn's dissenting opinion " that an offence, to be indictable, must either come within the spirit of some previous decision, or within some established general principle." A more recent case relied upon in Macdonald is *Kerr* v. *Hill*.[30] This case, however, involved no plea to the relevancy nor was there any mention of introducing a new crime, because giving false information of crime has long been established as criminal.[31]

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[27] (1847) Ark. 329.

[28] At p. 120.

[29] (1858) 3 Irv. 109.

[30] 1936 J.C. 71.

The other case cited as authority, *Logue* v. *H. M. Advocate*,[32] presents greater difficulties owing to Lord Justice-General Clyde's reference, with apparent approval, to the quoted passage from Hume. The court, however, did not require in this case to invoke the wider power when deciding to punish the bribing of a member of a licensing court. Bribing a judge is an established crime and so is it a determined principle that to attempt to defeat the course of justice is criminal. Bribing a member of a licensing court was held to fall within the principle. Lord Sands said [33] that the alleged offence fell within a category which there was sufficient authority for treating as criminal under the law of Scotland, and he preferred to express no opinion upon the Crown's wider proposition that a court of law in Scotland had inherent jurisdiction to punish any act as criminal albeit not falling within any recognised category of crime.

Lord Clyde again referred to the question in *M'Laughlan* v. *Boyd*,[34] where it was held to be an offence at common law to use lewd, indecent and libidinous practices towards an adult. Such conduct seems to fall within an established principle of criminal wrongdoing. But his Lordship went on to say (p. 22): " It would be a mistake to imagine that the criminal law of Scotland countenances any precise and exact categorisation of the forms of conduct which amount to crime. It has been pointed out many times in this court that such is not the nature or quality of the criminal law of Scotland. I need only refer to the well-known passage in the opening of Baron Hume's institutional work, in which the broad definition of crime—a doleful or wilful offence against society in the matter of ' violence, dishonesty, falsehood, indecency, irreligion ' is laid down. In my opinion, the statement in Macdonald's *Criminal Law* that ' all shamelessly indecent conduct is criminal ' is sound, and correctly expresses the law of Scotland." This passage could be interpreted as meaning that the courts still have an unlimited discretion. But, it is thought, the proper meaning of this passage is that all shamelessly indecent conduct (*i.e.*, of a sexual nature) falls within an established principle of criminal wrongdoing.

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[31] See Macdonald, p. 131—the crime may also be classified as fraud, see, *ibid.*, pp. 53 and 55.

[32] 1932 J.C. 1.

[33] *Ibid.*, p. 5.

[34] 1934 J.C. 19.

Another case in point is *Strathern* v. *Seaforth*,[35] where it was held to be a crime to steal the use of a motor-car. As Lord Justice-Clerk Alness explained,[36] the crime consisted in taking and using something clandestinely, without the permission of the owner having been given. He then continued: " It appears to me that the proposition for which the Crown contends is supported by the authorities which were cited. But speaking for myself, I should not have required any authority to convince me that the circumstances set out in this complaint are sufficient, if proved and explained, to constitute an offence against the law of Scotland."

Furtum usus, however, clearly fell within the established principle of theft although there may have been no exact precedent in point.

The proper scope of the existing but limited judicial power to extend the criminal law within the confines of established principle is perhaps best illustrated by the development of the class of crimes against the course of justice. These are an obvious insult to the law and government of the land. One crime deriving from this principle is prison breaking involving " the breaking of the state itself of public and lawful custody."[37] From a comparatively early date it came to be held that the escape or breaking out of prison could be committed without violence by any artful device and that those assisting were as guilty as the escaping prisoner, art and part. It was even held that the crime could be committed by taking advantage of the warder's negligence or of the Porteous mob having thrown open the Tolbooth gates.[38] In each case the facts libelled were merely new ways of committing established crimes. In the recent case of *Turnbull*[39] the accused was charged with hindering the course of justice by effecting the escape from prison of a person before his trial, by fraud and the uttering of forged documents (actually forged bail-bonds). The court had no difficulty in repelling a plea to the relevancy of the indictment. In *H. M. Advocate* v. *Martin and Others*[40] the departure from precedent was more pronounced. One accused was charged with defeating the ends of justice by escaping and another two with assisting him to escape from legal custody while out of prison in a working party. It was maintained for the accused that the facts libelled did not infer a recognised crime because the only existing crime in this category was breaking out of an actual prison. It was also maintained that the court had now no power to stigmatise as criminal what had never been so regarded before. On the second and more important question Lord Cameron was able to reserve his opinion, namely, " on the extent to which the power to declare new crimes still remains with the court today, or, if it does, in what circumstances it could or should be exercised." He was able to do so by holding that escaping from lawful custody in a working party[41] was an offence falling within an established general principle, although there was no precise precedent in point. And his Lordship expressly adopted the passage from the dissenting opinion of Lord Cockburn in *Greenhuff* already quoted.

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[35] 1926 J.C. 100.

[36] *Ibid.*, p. 102.

[37] Hume on *Crimes*, Vol. 1, p. 401.

Such a limited judicial extension of the law, however, is a far cry from what the majority of judges decided in *Greenhuff* and the absolute power there relied upon to declare all conduct criminal thought to be dangerous to the community.

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[38] Case of *James Ratcliffe alias Walker*, June 11 and 25, 1739. See Hume on *Crimes*, Vol. 1, p. 402, and other cases there reviewed.

[39] 1953 J.C. 59. The report, however, does not indicate that a plea to the relevancy was taken.

[40] September 30, 1955 (so far unreported).

[41] As defined in s. 12 of the Prisons (Scotland) Act, 1952.

The present position therefore appears to be that this wider power, as expressed by Hume, has never been authoritatively disapproved. Its disappearance has, however, been hinted at by Lord Normand in a passage recently adopted and approved by the present Lord Justice-General (Clyde)[42]: "If there is any doubt that the act set forth in the charge comes within the description of a known crime, then the charge is bad. The question is also one of due notice to the accused, and, unless he is given distinct notice that he is charged with a crime according to our law, the indictment or complaint must fall, whatever be the effect of the proof that follows upon it, and however complete the proof of a crime may be." But although there may have been no express disapproval of the wider power it has not been recently exercised. And if, as is here contended, the powers of the court to develop the law are now indeed as limited as they appear to have become in practice, it follows that the maxim *nulla poena sine lege* is part of Scots law because there can be no punishment except where conduct contravenes established law or legal principle.

The question is obviously of some constitutional importance affecting, as it does, the liberty of the subject and the respective powers and functions of courts and legislature. It may therefore, in conclusion, be legitimate to consider very briefly the attitude of the English courts. Not that the practice of the English judiciary need be regarded as the only criterion under British constitutional law.[43] But the decisions of the English courts have been relied upon in some Scottish cases dealing with this question.

The English courts certainly possessed the power to introduce new misdemeanours and the conspiracy cases were as much a judicial introduction south as north of the border. The indeterminate crimes of "public nuisance" and

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[42] *Coventry* v. *Douglas*, 1944 J.C. 13 at p. 20, adopted in *Quinn* v. *Cunningham*, 1956 S.L.T. 55. These cases are not otherwise in point.

[43] See *Glasgow Corporation* v. *Central Land Board*, 1956 S.L.T. 41.

" public mischief " also cloaked a wide discretion and would hardly be described by English common lawyers as founded upon any determined principle.

In his *Digest of the Criminal Law* (9th ed., 1950, p. 161) Sir James Fitzjames Stephen says that acts deemed to be injurious to the public have in some instances been held to be misdemeanours, because it appeared to the court before which they were tried that there was an analogy between such acts and other acts which had been held to be misdemeanours, although such first-mentioned acts were not forbidden by any express law and although no precedent exactly applied to them. The history of English criminal law, however, shows that the judiciary have not merely expanded it by interpretation of long-established rules, but also from time to time, when the facts of the case before them seemed to be such that it would appear proper for them to give rein to their personal feelings of indignation, have extended it by decisions which created new crimes for which there was no precedent whatsoever. (See Kenny's *Outlines of Criminal Law*, 1952 edition, p. 336, and cases there cited.) But this supposed power of unlimited judicial legislation has come in for considerable criticism in recent times. Sir Fitzjames Stephen himself in his *History of Criminal Law*, Volume III, p. 359, has written: " If Parliament is not disposed to provide punishment for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish. Besides there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined ; and this is an additional reason why its further development ought to be left in the hands of Parliament." Nevertheless, the indeterminate crime of effecting a " public mischief," which had fallen into desuetude, was recently revived when the

Court of Criminal Appeal gave new prominence to the wider doctrine in *R.* v. *Manley*[44]—whose facts were similar to those in *Kerr* v. *Hill*,[45] *supra*, and which one would not have ordinarily supposed to involve an entirely new mode of criminal conduct. But their Lordships went out of their way to adopt an old dictum of Lawrence J. in *R.* v. *Higgins*[46] to the effect that " all offences of a public nature, that is, such acts or attempts as tend to the prejudice of the community " are indictable. This statement is, of course, similar to the passage quoted from Hume and the opinions of the majority of judges in *Greenhuff*.

This view of the law has, however, been more recently disapproved by the same court in *R.* v. *Newland & Others*.[47] Referring to Lawrence J.'s dictum[48] Goddard C.J. said: " In effect it would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in days when Parliament met seldom or at least only at long intervals, it surely is now the province of the legislature and not of the justiciary to create new criminal offences. The Council, or, as it was more generally termed, the Court of Star Chamber, in its time rendered valuable service to the criminal law by declaring some matters, notably perjury, to be misdemeanours, though they never attempted to create new felonies. But conditions are now wholly different." His Lordship then considered that the right approach to " public mischief " cases was to regard them as part of the law of conspiracy and that the court should approach the subject at least with the same degree of caution as required in a civil action when considering whether a contract was contrary to public policy: " indeed, nowadays we know that matters which are to be regarded as contrary to public policy, as, for instance, to invalidate a contract, must be found in cases decided in the past and no additions are now to be made."

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[44] [1933] 1 K.B. 529.

[45] It is, perhaps, because the facts were similar that the Scottish case is erroneously regarded as like authority.

[46] (1801) 2 East 4 (T.A.C.) at p. 21.

[47] [1954] 1 Q.B. 158.

[48] *Ibid.*, p. 167.

It would therefore seem that the English courts have no longer an inherent power to create new crimes—however recently they may have attempted to do so. The Scottish courts have not done so since 1838. It is thought that the power should be allowed to remain in disuse for reasons stated by Lord Cockburn, in 1838, and echoed by Lord Goddard for England, in 1954.

W. A. Elliott.

THE INDEPENDENCE OF THE COLONIAL JUDICIARY

I

THE recent case of *Terrell* v. *Secretary of State for the Colonies*[1] has raised an issue of great colonial legal import: the independence of the colonial Supreme Court judge. It has brought into the open something of the confusion and misgivings surrounding this vital subject even among colonial legal experts.[2] The main issues may briefly be stated as follows:

(1) How is a judge appointed and what is his constitutional status in a colony?

(2) In what respects, if any, is a colonial judge like a judge in England and in what ways, if at all, is he different from the latter in his enjoyment of judicial immunity?

(3) When will an Act of the Imperial Parliament apply in its operation to the colonies?

(4) How far can a Department of State or an Executive Officer bind the Crown in its exercise of the Royal Prerogative or compromise the provisions of an Act of Parliament? In other words, if a judge is appointed " during pleasure " and not " during good behaviour," can the relevant instruments of his appointment ever constitute a contract binding on the Crown?

Before we attempt to examine these problems in some detail, let us first consider the material facts of the case itself.

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[1] [1953] 2 Q.B. 482; [1953] 3 W.L.R. 331; [1953] 2 All E.R. 490.

[2] Since the Arbitrator, Mr. Neville Gray Q.C., stated a special case for the opinion of the Queen's Bench Division it has been the subject of considerable comment in the British, as well as in Colonial, Press. It would be tedious and even pointless to recite the references here.

The relevant provisions are contained in the Straits Settlements Act, 1866. By section 2 Her Majesty was empowered by Order in Council to constitute such courts and officers as might be deemed necessary ; and by section 3 Her Majesty could delegate her powers in this respect to any three or more persons within the Settlements. Accordingly, these powers were by various Letters Patent conferred upon the Governor and his Executive Council from time to time, the last of which (dated in February, 1911) contained this clause : " . . . the Governor may, in our name and on our behalf, constitute and appoint such judges, . . . as may be lawfully constituted or appointed by us, all of whom, unless otherwise provided by law, shall hold their offices *during our pleasure*."[3]

In 1930 Terrell was by Royal Warrant appointed a Puisne Judge of the Supreme Court of Malaya by the then Secretary of State for the Colonies who informed him by letter that the compulsory retiring age was sixty-two. But in 1942, when he was only sixty years and seven months old and was spending a holiday in Australia, Malaya was overrun and occupied by the Japanese. As no suitable post could be found for him in the Colonial Legal Service, the Secretary of State for the Colonies offered him a pension, as for abolition of office, with effect from July, 1942. Terrell disputed the right of the Secretary of State for the Colonies to dismiss him, claiming that by section 3 of the Act of Settlement, 1700,[4] he held office *quamdiu se bene gesserint* and that he could not therefore be thus dismissed except on an address presented by both Houses of Parliament to that effect. In the alternative, he contended that if it should be held that he held office only " during Her Majesty's pleasure " (as provided in the relevant Letters Patent), his letter of appointment from the Colonial Secretary must be regarded as a binding contract entered into by the Crown that he would not be removed before he should attain the age of sixty-two. The plaintiff further argued that the contract could, before the Crown Proceedings Act, 1947, have been enforced by Petition of Right and that it was now enforceable under section 3 of that Act by an ordinary action at law. It was held that he had no cause of action against the Crown for the termination of his appointment. In delivering judgment Lord Goddard L.C.J. gave the following four reasons: (i) that it was clear from the Straits Settlements Act, the Royal Letters Patent and the Royal Warrant appointing Terrell that he, like all judges in the Straits Settlements, held office during pleasure only; (ii) that the applicability of the Act of Settlement to the Straits Settlements or, indeed, to any colony was not automatic and that colonial judges hold their office primarily by virtue of their establishment by the Crown or Parliament; (iii) that the correspondence relating to the appointment of Terrell or of any other colonial judge could not possibly constitute a contract, since the Royal Warrant merely informed him of the general conditions attaching to the office to which he was being appointed; and (iv) that the Crown could therefore dismiss at pleasure any judge appointed " during pleasure " and that no correspondence between the judge and the Secretary of State for the Colonies either before or after the appointment could affect the conditions laid down in a Royal Appointment.

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[3] The italics are the present writer's.

[4] See now s. 12 (13) of Supreme Court of Judicature (Consolidation) Act, 1925.

It seems convenient to dispose here of question (4) posed above. *Dunn* v. *R.*[5] is authority for the proposition that servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. The facts briefly were as follows: Sir Claude McDonald, Her Majesty's Commissioner and Consul-General for the Niger Protectorate (in Northern Nigeria), acting on behalf of the Crown, had engaged the suppliant (by a petition of right tried before Day J. with a jury) in the service of the Crown as consular agent in that region for a period of three years certain. The suppliant then claimed damages for having been dismissed before the expiration of the agreed period. Held (1) that contracts for the service of the Crown were determinable at the pleasure of the Crown; and (2) that Sir Claude McDonald had no power to appoint a subordinate officer for a definite time so as to preclude the Crown from dismissing him before that time expired.

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[5] [1896] 1 Q.B. 116.

More recently, it has been held in *Mackay* v. *Lord Advocate*[6] that members of the Scottish Land Court, other than the Chairman, hold their appointments for life or until removed from office for inability or misbehaviour under section 3 (4) of the Small Landholders (Scotland) Act, 1911; and that a clause in the commissions of two such members which imposed the condition that they should vacate office at the age of sixty-five or earlier if incapacitated by ill-health or otherwise, was *ultra vires* and illegal.

Terrell's attempt to build his hope on *Reilly* v. *R.*[7] was negatived by Lord Goddard in these words[8]: "The actual point material to this case which the Judicial Committee decided was that if the terms of an appointment definitely prescribe a term and expressly provide for a power to determine 'for cause' that excludes an implication that the appointment is at pleasure." But that was far from being the position in *Terrell's* case. In any case a court is precluded from inquiring into the origin of what has become an established rule of law,[9] *viz.*, that the Crown is not bound in the circumstances of the instant case.

II

Let us now return to the other questions we posed at the beginning of this essay in order to elaborate the general principles relating to the juridical as well as the constitutional status of a colonial judge.

It is fairly clear that the normal mode of appointment of a colonial judge[10] is as follows. Following a formal application for a post the candidate for judgeship is interviewed in England by the Secretary of State for the Colonies who may thereafter offer him the post. His appointment becomes effective, however, only when, on his arrival in the colony, the Governor by the exercise of his powers under Letters Patent in that behalf confirms it by letter to the officer and by notification in the local *Gazette* under the Public Seal of the colony issued in pursuance of a warrant.[11] The Colonial Secretary only selects or approves but does not appoint to a judicial post, although he has complete discretion over appointments to the Unified Service.[12] Membership of the Unified Service, while conferring status upon an officer, does not give him the right to exercise official duties or to draw any salary out of the funds of the colony. He is entitled to enjoy these rights only as a result of his appointment by the Governor to his particular post in the local public service.[13]

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[6] 1937 S.C. 860; 1937 S.L.T. 577.

[7] [1934] A.C. 176; 50 T.L.R. 212.

[8] At p. 342 of [1953] 3 W.L.R.

[9] *Pillans* v. *Van Mierop* (1765) 3 Burr. 1663, taken together with *Rann* v. *Hughes* (1778) 7 Term Rep. 350n.; 4 Bro.Parl.Cas. 27.

A Chief Justice is " a high and independent Officer of State in the colony "[14] who ranks next after the Governor but is none the less a member of the Colonial Legal Service[15] and holds office " during His Majesty's pleasure," as also do all the judges under him.[16]

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[10] The same applies to a magistrate.

[11] Of course, the reverse procedure occurs where it is the Governor who initiates the appointment to a Colonial Supreme Court Bench of one of the local barristers, be he expatriate or native born. After consultation with the Chief Justice, a recommendation is made to the Secretary of State for approval of the candidate's appointment.

[12] Jeffries, *The Colonial Empire and Its Civil Service* (*1938*), pp. 94, 100.

[13] It has been held that the power given by Letters Patent to a Governor to appoint judges in a colony having a legislature (Colonial Laws Validity Act, 1865, s. 5) is limited to cases in which a fixed salary is payable by law: *Buckley* v. *Edwards* [1892] A.C. 387.

[14] See *Appointments in His Majesty's Colonial Service*, C.S.R.I., 1951, at p. 50.

[15] The Colonial Legal Service was constituted with effect from July 1, 1933, and was based on a " schedule " of posts, the holders of which on the appointed date automatically became members of the new Service. Legal and judicial posts in certain colonies were customarily filled by locally appointed lawyers and were therefore " unscheduled." " But, broadly speaking, the schedule comprised all the higher legal and judicial posts in the colonies, *i.e.*, on the legal side the Attorney-General, Solicitor-General, and Crown Counsel; and on the judicial side the Chief Justices, Judges and professional Magistrates." (See p. 76 of Jeffries, *op. cit.*)

[16] The Supreme Court Ordinance of every colony contains a provision to this effect; *e.g.*, s. 4 of Cap. 211 of 1948 Edition of the Laws of Nigeria.

Now all officers of the Colonial Service are in the employment of the Crown, whether or not they are members of the Unified Service and whether or not they are selected by, or appointed subject to the approval of, the Secretary of State for the Colonies. The implication of this is that all judicial officers hold their appointments at the pleasure of the Crown. For that reason, termination of any of such appointments is signified by the Crown through the Colonial Secretary " at any time and without special formalities." Jeffries summarises the position in these words:

> " In other matters of conditions of service, legal and judicial officers are treated in the same way as the members of other Unified Services. . . . They (judges) hold ' during Pleasure,' but the Secretary of State for the Colonies has given a pledge that they shall not be dismissed unless His Majesty in Council is so advised by the Judicial Committee of the Privy Council. What this means in practice is that a judge is protected in the tenure of his office except in the event of proved misconduct. It has also the minor consequence that the ordinary rule of a Unified Service with regard to the liability of the individual officer to be compulsorily transferred by the Secretary of State for the Colonies does not apply to judges." [17]

Three points in this excerpt call for comment. The first is the problem of what constitutes judicial misconduct, with which we shall deal in Part IV below. The second is the question of dismissing judges on the advice of the Judicial Committee of the Privy Council; and the third point we may dismiss by saying that the judges' freedom from compulsory transfer is not a great instance of their independence of executive control, since in practice the exigencies of the service as a whole are paramount.

The second point requires further elucidation if only because the precise mode of removing a judge from office is not always appreciated and is at any rate not stated in the judgment under discussion. Before we go into this important matter, however, it is as well that we first examine the position of the colonial judge in relation to that of an English judge. This is our question (2) posed at the beginning of this essay.

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[17] At p. 148, *op. cit.*

III

Here it is common to assume that colonial judges are, so far as regards their exercise of the judicial office, not different from judges in England. In spite of their heavy dependence upon both the United Kingdom Executive and the Colonial Executive under whom they work, the assertion of judicial independence is still made, as for instance this one by Jeffries [18]: " As for the judiciary, nothing is spared to preserve its dignity and its traditional independence. The Chief Justice and, in their several degrees, the judges are regarded with all the respect due to their high office. The Chief Justice of a Colony normally ranks as second only to the Governor in official precedence, and is customarily addressed as ' His Honour '." [19]

Another, and probably more authoritative, pronouncement to the same effect is that of Sir Harold Duncan Q.C., former Legal Adviser to the Colonial Office, in *The Times* of June 27, 1953: " I think it can fairly be said that, owing to the exceptional importance attached by successive legal advisers to the Secretary of State for the Colonies to the principle of non-interference by the Executive with the Judiciary, in practice ' Judges in British colonies, in discharging their judicial duties and in reaching conclusions of fact on issues before them, are just as independent of the Executive as is the case with judges in this country

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[18] *Op. cit.*, at p. 147.

[19] In some small colonies like St. Helena, the Falkland Islands and (*formerly*) British Somaliland the Governor even acts as judge—see p. 143 of Jeffries, *op. cit.* *Per contra* with regard to St. Helena, as the Chief Justice has always seemed to be an independent person—*vide* Order in Council of February 13, 1839 (Laws, 1950).

(Britain)'." Again, when the former Colonial Secretary, Mr. Oliver Lyttleton's attention was drawn to the decision in *Terrell's* case in the House of Commons on July 1, 1953, by Sir Herbert Williams to the effect "that colonial judges are not protected against the Executive" and he was asked whether he would consider introducing legislation to give colonial judges the same protection as judges in the United Kingdom, he replied: "I am fully aware this is a most important matter. . . . The safeguards for colonial judges are at least as great as they can get by legislation."[20] He then said that he wondered whether it would be proper for the United Kingdom Government to legislate in matters which were the concern of the colonial territories themselves.

In England, on the other hand, it is well established that since the Act of Settlement, 1700, judges of the High Court hold office during good behaviour and can only be removed by an address of both Houses of Parliament. This means in practice that they are irremovable, as there is no recorded instance in which Parliament has had to exercise this power.[21] As Lord Goddard L.C.J. has rightly reminded us: "So accustomed are we in this country nowadays to the exceptional position occupied by the judges of the Supreme Court that we are apt to forget that their independence is comparatively modern in the long history of our law."[22] His Lordship then went on to recall how from the middle of the twelfth century, when a body of professional judges first emerged in England, to the very last year of the seventeenth century, the judges of the Royal Courts undoubtedly held their office at the pleasure of the Sovereign so far as any statutory provision was concerned, though according to Hallam[23] the commissions of the judges in William III's reign were made *quamdiu se bene gesserint*.

It is also useful in this connection to recount, as did His

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[20] See *The Times* (London) of July 2, 1953.

[21] Wade and Philip, *Constitutional Law* (1951 impression), p. 235.

[22] At p. 338 of [1953] 3 W.L.R.

[23] *Constitutional History of England* (1869), p. 736.

Lordship,[24] the insecurity of tenure of English judges below the rank of the High Court cadre: " The great majority of judicial personages in this country do not enjoy the exceptional position of the judges of the Supreme Court. County court judges do not, though they do have a measure of protection by section 7 of the County Courts Act, 1934, nor do justices of the peace who deal with something like 90 per cent. of all criminal cases as well as with a multitude of civil matters. They have no security of tenure. Stipendiaries hold office during pleasure: see the Stipendiary Magistrates Act, 1863, s. 3, and the Municipal Corporations Act, 1882, s. 161. So do the metropolitan police magistrates by the Metropolitan Police Act, 1829, s. 1. So it is not fundamental to the office of a judge that he should possess the immunity with which it was found necessary to clothe the judges of the Supreme Court by reason of what was considered the undue subservience of the judiciary in the time of the Stuarts towards the Sovereign and more particularly the attitude that they had taken up under fear of dismissal in upholding the exercise of the suspending power of James II."

While the descriptive part of this excerpt may serve to portray the formal, as opposed to the essential, insecurity of lower court judges' tenure in England, it is submitted with the utmost respect that it is just not the case that immunity from executive interference and control is not fundamental to the office of a judge, British or Colonial.[25] Otherwise, there would have been no point in inserting the protective provision into the Act of Settlement, 1700. With regard to lower court judges, from those with qualified lawyers at their head downwards, the influence of the Act undoubtedly generates the healthy feeling that they too are just as free of executive interference: at least, in practice they behave and are regarded as if they were.[26]

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[24] [1953] 3 W.L.R. at p. 339.

[25] " Tenure of Office by Colonial Judges " by Mr. S. A. de Smith in Mod.L.R., Vol. 16, No. 4, October, 1953, pp. 502–506, would seem on the whole to support our point here. *Per contra*: an Editorial Note, " Tenure by Colonial Judges," in L.Q.R., Vol. 69, No. 276, October, 1953, pp. 442–443, where the orthodox view has been advanced.

Moreover, the opinion expressed in the quotation would appear to equate the status of judges of colonial Supreme Courts with that of county court judges, stipendiaries and police magistrates in England.[27] Against this it must be recalled that all known Ordinances establishing colonial Supreme Courts contain an invariable provision[28] to the effect that the jurisdictional competence of these courts and their judges is identical with that of His (or Her) Majesty's High Court in England.

Before we leave this part of our discussion of the legal position of judges we would do well to note that there are common law as well as statutory safeguards for judges in the actual performance of their judicial functions. Some of them may seem to favour the judges but all are designed to ensure that they carry out their delicate task without fear or favour, affection or ill will. Thus, in *Anderson* v. *Gorrie and Others*[29] it has been laid down that no action lies against a judge of the Supreme Court of a colony (in the case itself, the colony is Trinidad and Tobago) in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice. But, and this is quite as important: "If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the Superior Courts and other judges consists in the extent of their respective jurisdiction."[30]

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[26] Thus *Law* v. *Llewellyn* [1906] 1 K.B. 487, granted immunity to a Justice of the Peace when acting judicially. Also, the Justices Protection Act, 1848 (11 & 12 Vict. c. 44) gives them general if qualified protection. See, in addition, Anson's *Law and Custom of the Constitution* (1935), Vol. II, Pt. II, pp. 302–303.

[27] The implied analogy could, of course, serve to indicate the relative legal position of colonial judges and magistrates with similar powers.

[28] *e.g.*, ss. 11 and 12 of c. 211 of the 1948 edition of the Laws of Nigeria; s. 14 of c. 4, Laws of the Gold Coast, 1936 edition; ss. 31 and 32 of c. 2 of the Laws of Fiji, 1945 edition; ss. 12 and 13 of c. 11 of the Laws of Cyprus, 1949 edition; ss. 8–11 of c. 10 of the 1936 edition of the Laws of the Straits Settlements.

[29] [1895] 1 Q.B. 668. This case was based on the Privy Council ruling in *Haggard* v. *Pélicier Frères* [1892] A.C. 61, at p. 68, *per* Lord Watson.

[30] *Ibid.*, at p. 671.

Equally, it does not seem to be the case that immunity can be claimed for purely *ministerial*, as distinct from *judicial*, acts of colonial judges.[31]

On the statutory side, most if not all colonial Criminal Codes contain a provision making all forms of judicial corruption by whatever class of judges serious offences attracting grave penalties in established cases.[32] On the other hand, the various Supreme Court Ordinances exempt judges of all colonial courts, acting in good faith, from all *civil* liability for judicial acts[33] " whether or not within the limits of his jurisdiction." Similarly, the Criminal Codes relieve judges of *criminal* responsibility for acts or omissions made in good faith in the exercise of their judicial office.[34] And since all colonial judges are required by statute to take the oath of allegiance to the reigning British monarch it would seem that it is treason, the punishment for which is death, to slay colonial judges (Treason Act, 1351).

IV

Barring the difficulties about the various *obiter dicta* we have been discussing in the preceding section, the actual decision in *Terrell's* case can be supported on the two grounds, (a) that under existing law the colonial judge holds office " during pleasure " ; and (b) that the Act of Settlement, 1700, which provides that the English judge holds office " during good behaviour," is not exactly applicable to colonial judges. This latter ground leads us to our question (3) at the head of this essay.

The Lord Chief Justice, quite rightly we think, insisted on being furnished with proof that the immunity of the judges which the Act enshrines automatically formed part of the law of every newly established colony: "If a tenure equivalent to that conferred by the Act of Settlement were intended I should expect to find it stated clearly somewhere and not left to be implied by inference."[35] Since Terrell's contention to the contrary would have won him his case if upheld, it seems proper briefly to examine the issue a little further here.

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[31] All these are on all fours with the principles upheld in English cases: see, *e.g.*, Clerk & Lindsell, *Law of Torts*, 10th ed., pp. 277–280, 840–848.

[32] *e.g.*, s. 114 of the Criminal Code of Nigeria, c. 42 of 1948 edition of The Laws; ss. 93 and 94 of the Bermuda Criminal Code, c. 4 of the Bermuda Laws, 1931; ss. 394, 398 and 400 of the Gold Coast Criminal Code, 1936 edition, c. 9.

[33] *e.g.*, s. 85 (1) of c. 10 of 1936 edition of the Laws of the Straits Settlements; s. 74 of the Nigerian Supreme Court Ordinance, c. 211 of 1948 edition of the Laws.

[34] *e.g.*, s. 77 of c. 20 of 1936 edition of the Laws of the Straits Settlements; s. 31 of c. 42 of 1948 edition of the Laws of Nigeria.

Why, it may be questioned, did no one in the case raise the point whether the Act of Settlement, 1700, is "an Act of general application in England" so that it ought to form part of the "English common law, principles of Equity and Statutes of general application which were in force in England" when the Supreme Court was established[36] in the Straits Settlement in 1868? English law, including Imperial enactments in force in England in 1868, became applicable to the colony from that moment. Also, the Colonial Laws Validity Act, 1865, makes Acts of the Imperial Parliament generally operative in any colony unless there is an express provision to the contrary in any particular Act.[37] So that if the Act of Settlement of 1700 was an Act of general application in England in 1868 when the Supreme Court of the Straits Settlements was established, it ought in the absence of proof to the contrary to be applicable to this or any other colony in a similar situation. But it would seem that the specifically local character of the Act and its peculiar historical antecedents render it unlikely that the Act of Settlement of 1700 contemplates any extension of its provisions beyond the immediate frontiers of England.

In saying this we would like to point out, however, that Terrell's argument that the procedure for removing colonial judges ought to be analogous to that for removing English judges would not seem to lack official support, as witness what is said in the Colonial Office Memorandum regarding the case of a Mr. Justice Boothby from the colony of South Australia whose Legislative Assembly had presented an address to the Crown for the removal of the judge in the spirit of the Act of Settlement. The only difficulty there pointed out was not whether the Act did or did not apply to the colony, but that the address thus presented would still need to be backed by the advice of Her then Majesty's Ministers in the United Kingdom.[38]

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[35] [1953] W.L.R. at p. 340. The Lord Chief Justice also pointed out the impossibility of applying to a colony the provision of s. 3 of the Act regarding the presentation of an address by both Houses of the *Imperial* Parliament (at p. 336).

[36] s. 6 (1) of Supreme Court Ordinance No. 5 of 1868; s. 4 (1) of Courts Ordinance, 1926; and s. 4 (1) of the consolidating Ordinance, the Courts Ordinance, 1935 (Revised Laws of the Straits Settlement, 1936, c. 10).

[37] Wade and Philip, *op. cit.*, pp. 41, 406–408.

The result may accordingly be expressed in this way, that while section 3 of the Act of Settlement of 1700 may not directly apply to a colony in respect of its protection of judges from executive interference, nevertheless, a kind of colonial constitutional convention having the authority of Imperial sanction has arisen to make it applicable by analogy in all colonies possessing a Legislative Assembly.

V

If, however, the mode prescribed by English law for the removal from office of English judges of the High Court is deemed *sui generis* and, therefore, inapplicable to judges of colonial Supreme Courts, how are the latter to be dealt with? A solution to this conundrum was attempted by Burke's Act (22 Geo. 3, c. 75, s. 2) under which the Governor and his Executive Council were empowered to remove colonial judges from office on the ground of proved neglect or misbehaviour or of absence from the colony without reasonable cause. A few examples of the practical application of this Act will illustrate its degree of effectiveness.

Thus, in *Willis* v. *Gipps*,[39] a judge of the New South Wales Supreme Court was dismissed from office by an order of amotion made by the Governor and Executive Council of the colony. The judge appealed to Her Majesty against the order and the Privy Council, to which the matter had then been referred for necessary action, reversed the order as the judge had not been given an opportunity of being heard on the spot. On the other hand, in *Montagu* v. *Lieut.-Governor and Council of Van Dieman's Land*,[40] a judge of the colony's Supreme Court used his judicial position to manipulate the composition of the court in order to obstruct his creditor from recovering a debt due from him. The Governor and Council investigated the matter and, on finding that the judge was to a large extent involved in bill transactions and pecuniary embarrassment, ordered him to vacate his office. On an appeal by the judge the Privy Council observed that although there was some irregularity in the issuing of the order, yet the judge having sustained no prejudice thereby, the Governor's order of amotion ought not to be reversed.

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[38] See Part V, *infra*, for the development of this point.

[39] (1846) 5 Moo.P.C.C. 379.

However, in *Re Muir*,[41] where the judges of a colonial court failed to enter up their judgment as they were required by statute to do, the Privy Council refused to issue an order in the nature of a mandamus to the judges to enter up such judgment as a result of the verdict given in favour of the plaintiff in an action of assault. Their Lordships merely recommended the petitioner to apply again to the judges with an intimation of their Lordships' opinion.

But even where the Privy Council had issued a directive to a colonial judge who had failed to carry it out to the letter, the judge might not be subjected to any penalty unless found to be corrupt or insubordinate. Thus, in *Barton* v. *Field*,[42] the judge of a Vice-Admiralty Court decreed the sale of a ship after he had been served with an inhibition from the Judicial Committee of the Privy Council. On the matter being brought to their Lordships' notice they refused to attach him, since it was not established to their satisfaction that there was on the judge's part a wilful error induced by corrupt or improper motive.

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[40] (1849) 6 Moo.P.C.C. 489.

[41] (1839) 3 Moo.P.C.C. 150. *Cf. Re Assignees of Manning* (1840) 3 Moo.P.C.C. 154.

[42] (1843) 4 Moo.P.C.C. 273.

In *Re Wells*,[43] however, the Chief Justice of the Island of Grenada, on his own authority and without the consent of his Assistant Justices (which consent was required by statute), made certain rules prohibiting them from doing any act in chambers except in the case of his own absence from the island, illness or personal interest in the act. The Privy Council held that by the law of Grenada he had no power to do what he purported to have done. Similarly, in *Buckley* v. *Edwards*,[44] the Privy Council held that the Governor of the colony of New Zealand, which had then a constitutional form of government, had no power to add without limit to the number of judges of the Supreme Court without the express sanction of the local legislature.

A somewhat extreme case is *Gahan* v. *Lafitte*[45] where certain persons, who had exercised the office of judges under commissions issued irregularly by the Governor of St. Lucia, were held liable in an action by an aggrieved party for trespass and false imprisonment for acts done by them while so acting.

Finally, in *Representatives of the Island of Grenada* v. *Sanderson*,[46] a memorial was presented to the Queen by one branch of the Legislature of Grenada preferring eleven charges against the Chief Justice of the colony and praying the Crown to adopt such measures of relief to the inhabitants of the colony as should seem expedient and justifiable. The memorandum having been referred to the Judicial Committee, their Lordships found (1) that the Chief Justice had in the course of fourteen years of office committed acts that were partly intemperate and partly illegal, but (2) that, owing to the long lapse of time since all the acts but one were done, and the fact that the last act (committed only three years previously), though erroneous and improper, was done in the execution of what the Chief Justice thought his duty, their Lordships could not say that he should be removed for misbehaviour.

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[43] (1840) 3 Moo.P.C.C. 216.

[44] L.R. (1892) A.C. 387.

[45] (1842) 3 Moo.P.C.C. 382.

[46] (1847) 6 Moo.P.C.C. 38.

From the foregoing cases it will be seen that attempts to unseat colonial judges under the vague provisions of Burke's Act took the three main forms of (a) an order of amotion by the Governor and Council of the colony (this is the one envisaged by the Act itself); (b) a petition by an aggrieved individual to Her Majesty (here the petitioner might be the dismissed judge himself or some private person damnified by his alleged judicial misconduct); and (c) a memorial presented by a colonial legislature or branch of it on behalf of the local inhabitants or a section of them.

Nevertheless, the position was still so unsatisfactory that in pursuance of a request from the Earl Granville, the then Secretary of State for the Colonies, a memorial[47] was drawn up by order of the Lord President, later submitted to and confirmed by the Lords of the Council in 1870. It says in its second paragraph:

> "It is obvious that some effectual means ought to exist for the removal of colonial judges charged with grave misconduct; and these means ought to be less cumbrous than those existing for the removal of one of Her Majesty's judges in England. The mode of procedure ought to protect judges against the party and personal feelings which sometimes sway colonial Legislatures, and to ensure to the accused party a full and fair hearing before an impartial and elevated tribunal."

The reason for the dissatisfaction with the earlier arrangement for removing colonial judges was that even where, as in the well-known case of Mr. Justice Boothby of South Australia, an address had been presented to the Crown by the colonial legislature to that effect, the disposal of the charge thus brought against the judge was the responsibility of the Crown advisers in the United Kingdom. When a judge's suspension had been ordered by a Governor under Burke's Act, the matter was either referred by the Queen to the Judicial Committee of the Privy Council on the recommendation of the Secretary of State for the Colonies or the latter himself would advise the Crown, without such reference, to confirm or to disallow such suspension. Whenever there was a reference it might be made to a Committee of the Privy Council generally or to the Judicial Committee, in which latter case the Colonial Secretary usually sat with the judges under the chairmanship of the Lord President.

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[47] Printed *in extenso* as Appendix II to Vol. 6 of Moore's Privy Council Cases (New Series), from which the substance of what now follows has been taken. The full title is: "Memorandum of the Lords of the Council on the Removal of Colonial Judges." It is followed in the Appendix by the observations thereon of Lord Chelmsford, of The Right Hon. Stephen Lushington, and of Sir Edward Ryan.

If the case had been brought up by petition from a colonial Assembly, the Judicial Committee exercised an *original* jurisdiction over it. This method was usually adopted in " a cumulative case of judicial perversity tending to lower the dignity of his office and perhaps to set the community in a flame." It might in such a case be difficult for the local Executive to act on its own responsibility.

If the case came up in consequence of a Governor and Council's order of amotion (*i.e.*, suspension), then both the Governor and the judge were put on their trial, and to have taken unwarrantable proceedings against a judge would doutless be regarded as a most serious offence on the Governor's part. This course was normally taken in a case when a judge was charged with " gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, on evidence sufficient to satisfy the Executive Government of the colony of his guilt." The Judicial Committee exercised in such a case its customary *appellate* jurisdiction.

The procedure by petition was found to be " more dilatory, more expensive, more onerous to the parties and less satisfactory to their Lordships " than that by way of previous suspension or amotion. The reasons for this were :

(1) " The Privy Council accustomed to act as a Court of Appeal, that is, to review the evidence and decision of inferior tribunals, has by its constitution considerable difficulty in exercising an original

jurisdiction, especially when the evidence has to be transmitted from the colonies. No regular system of pleadings and procedure can be said to exist in such cases. The consequence is that, the charges being often loose, vague and multifarious, their Lordships have not found it easy to reduce them to distinct and positive issues of fact or law, such as are necessary to the maintenance of a quasi-criminal proceeding."

(2) To enable the accused person to prepare his defence, affidavits and other written evidence had to be filed by one side and answered by the other, often after a considerable delay of some two or three years. The judge would, of course, retain his office all this long while.

(3) The final materials were often loaded with a mass of irrelevant matter. Since either side was being advised by counsel, their Lordships could not exercise any control over these preliminaries, seeing they were unacquainted with the merits of the case up to that point.

Compare with this the procedure by amotion, *i.e.*, the right of appeal or of temporary suspension followed by a reference to the Judicial Committee in England. In that event the judge is at once relieved of his post, is given notice of all the charges against him, and is then called upon to answer them and is entitled to be heard on the spot. The Governor, knowing that his decision would later be reviewed on appeal to the Judicial Committee, must submit a record of the proceedings and of the evidence in accordance with the precise provisions of Nos. 83–86 of the Colonial Regulations. The matter could therefore be disposed of by the Committee much more expeditiously than in the case of a hearing by petition.[48] But the Memorandum is emphatic that the most correct, though not the most convenient, form of procedure in the case of a colony with a Legislative Assembly is by petition:

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[48] Then, a reference was made in this Memorandum of 1870, to the case of a Mr. Cloete: "Mr. Cloete's case (8 Moo.P.C.C. 484) is a very fair sample of a proceeding judiciously conducted in this manner. That gentleman had been improperly removed from a judicial office on April 19, 1853; he was restored to

> "It is scarcely necessary to add that in colonies having legislative Assemblies those Assemblies cannot be deprived of their undoubted constitutional right to address the Crown for the removal of a judge; and the exercise of this right is altogether independent of the course which the Governor of the colony may think fit to adopt."

This categorical statement that colonial legislatures have a constitutional right to present to the Crown an address for the removal of a judge does not seem to have been brought to the due attention of the court in *Terrell's* case, or the court would not have asserted so uncompromisingly that the securing of the immunity of judges by an address presented by a colonial legislature is not a first principle of the British Imperial Constitution.[49]

VI

Summary and Recommendations

Terrell's case is therefore important in colonial law. As we have seen, the Memorandum of 1870, which is the operative law on the subject, specifies these two chief modes of procedure for removing a colonial judge: (a) by a Governor and Council's order of suspension, and (b) by a petition of the colonial legislature, followed in either case by a trial before the Judicial Committee of the Privy Council in England. *Terrell's* case follows yet a third but nevertheless well-established procedure of an action in the Queen's Bench Division of the High Court; further, the dispute between him and the Government had first been submitted to arbitration and it was his dissatisfaction with the

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it by their Lordships on February 20, 1854; and as he had undoubtedly suffered an injustice, their Lordships expressed their desire that he should be indemnified for the expense he had been unjustly put to; and he was, in fact, soon afterwards promoted to a higher judicial office."

[49] See p. 53.

arbitrator's award that led to the latter's having to state a special case for the opinion of the High Court.

In view of these various ways by which the colonial judge is protected, one may at first be tempted to conclude that the present arrangement is satisfactory. But it is respectfully submitted that the existing machinery is inadequate for modern purposes because: (1) The constitutional structure of colonial territories in 1870, upon which the current principles have been based, has since radically altered. The emergence of Asian and African colonies with unofficial majorities in the local legislatures was then largely in the bosom of the future. Most of the colonies envisaged were either European in population or run exclusively (or almost exclusively) by Europeans. (2) The development of representative and responsible Legislative Assemblies and the consequent replacement of the Governor's *advisory* Council by *Executive* or *Ministerial* Councils have since raised the issue of the extent of the Governor's liability to answer *personally* for a concerted decision to suspend a colonial judge. In many colonies, the Governor no longer acts regardless of the advice of his Executive Council. Would every member now have to be dragged before the Privy Council or would the Governor represent them as well as himself, when in both cases all must answer for any irregularity of which they might be found guilty? (3) The extra-legal factor of emergent nationalism in the Asian and the African colonies would render highly suspect any attempt, however just and necessary, to punish colonial members of a Governor's Executive or Ministerial Council in circumstances just stated in (2) above. (4) The elevation to the Bench in increasing numbers of locally recruited Asian and African lawyers within the last two decades or so must create special problems if the existing law for the removal of judges were ever to be applied to them. Many of them have yet to opt for membership of the Unified Service. Also, the creation of a local civil service, such as has recently taken place in the Gold Coast, should affect our considerations regarding the position of judges. (5) Some colonial or quasi-Dominion territories have rather complicated constitutions, sometimes with varying provisions for the removal of judges from their office. Consider in this connection the problematic Central African Federation. Section 38 (2) of the Constitution of Southern Rhodesia provides that judges of the Supreme Court " shall not be removed except by the Governor in Council on an address from the Legislative Council and Legislative Assembly in the same session praying for such removal on the ground of proved misbehaviour or incapacity." In both Northern Rhodesia and Nyasaland, on the other hand, the Supreme Court judges hold office " during Her Majesty's pleasure " and are accordingly removable at the will of the Crown. When the Federal Supreme Court comes into being and the Chief Justices or Acting Chief Justices of all three territories become its judges,[50] would the security of tenure of the judges of the highest court in the new colony be thereby enhanced? It is true this is, so far, an exceptional instance, but it seems desirable to anticipate all constitutional contingencies that present-day political freaks in the colonies might face us with at any time.[51]

A simple solution to the tangled issue of removability of colonial judges would be for Her Majesty's Government to reaffirm throughout all dependent territories the colonial peoples' " undoubted constitutional right to address the Crown for the removal of a judge," to which the 1870 Memorandum bears such an eloquent testimony. It need only be clearly stated that an address by the legislature, whether unicameral or bicameral, of any colony should suffice for its Supreme Court judges' removal in cases of proved misbehaviour or incompetence. Wherever there is also a Cabinet or Council of Ministers the motion for dismissal should have received its confirmation, on proof of which Her Majesty's approval should be granted as a matter of course. The advice of the local Ministers of the Crown would thus replace that of the Imperial Ministers in the United Kingdom so far as the particular colony was concerned.

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[50] See Cmd. 8671, Feb. 1953, s. 114.

[51] See *The Times* editorial of Saturday, June 20, 1953, and a letter by a Mr. A. I. Kaufman in *The Times* of June 24, 1953, in which similar fears have been expressed.

While this suggestion would suit the case of locally recruited judges of the colonial Supreme Courts, it would hardly meet that of members of the Colonial Legal Service (to which some colonials have adhered on appointment to the Bench) who happen to feel disgruntled at an address presented by a colonial legislature for their removal. In that event, a proviso might be added to the effect that such cases could be taken on appeal to Her Majesty's Judicial Committee of the Privy Council for final adjudication.

Finally, if one were to adopt the view of the former Colonial Secretary, Mr. Lyttleton,[52] that the matter of regularising the removal of judges is "the concern of the colonies themselves," then it would be up to each colony to enact appropriate legislation specifying the conditions of such dismissal—and this should still have regard to the special case of "expatriate" judges. These must have greater, not less, security of tenure under any such new arrangement. The procedure might be roughly the same as that just recommended for action by Her Majesty's Government; the only difference would be that the enabling legislation would be initiated by the several colonial legislatures themselves instead of by the Imperial Parliament. The latter would have the merit of ensuring uniformity in the treatment of colonial judges, while paying due regard to the individual peculiarities of certain colonial constitutional set-ups. It would be essential, for instance, to stipulate that a motion for the removal of a colonial Supreme Court judge should be carried by a simple, a two-thirds or a three-fourths majority or by a unanimous vote of those present at the particular sitting of the Legislative

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[52] See p. 52.

Assembly.[53] Thereafter, the matter should proceed as already outlined above.

This all-important matter of the independence of colonial judges deserves an early solution. This essay has attempted no more than to draw attention to the present unsatisfactory state of affairs.

T. O. ELIAS.

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[53] It is strongly suggested, however, that the minimum voting strength that should be requisite in all cases should be three-fourths.

CASES AND COMMENT

1. SCOTTISH CASES

NEGLIGENCE—relevancy—window-cleaner falling from window.

There has been a spate of cases in both England and Scotland in the last two or three years arising from accidents in which a window-cleaner has fallen from a window-sill; see for example *Hamilton* v. *University of St. Andrews*, 1955 S.L.T. (Notes) 75, and cases there referred to. *Pullar* v. *Window Clean Ltd. and Others*, 1956 S.L.T. 17 is the latest Scottish instance. The injured cleaner sued his employers and also the owners and occupiers of the property from which he had fallen, the latter on the ground of breach of statutory duty. The statute in question was the provision in the Edinburgh Corporation (Streets, Buildings and Sewers) Act, 1926, which provided that in buildings built or reconstructed after the date of the Act the windows should be constructed so as to admit of being cleaned from the inside. The owners were alleged to have reconstructed their building after the relevant date but not complied with the statutory requirement nor with the Dean of Guild warrant which had imposed this as a condition of the reconstruction. The First Division held that this was one of the statutory obligations breach of which did not confer upon a person injured in consequence of the breach a right to claim damages. The case was, as almost all such cases are, a sheer question of statutory construction in which something could be said for either view: the view of the court, that the provision was primarily intended to facilitate the cleaning of upper-storey windows for reasons of health, and not a duty imposed for the protection of window-cleaners, was manifestly reasonable having regard to the language of the Act and, it is suggested, correct. The alternative view would have been a more strained reading and an onerous extension of the occupier's liabilities.

D. M. W.

MURDER—diminished responsibility—drink.

In *H. M. Advocate* v. *Macleod*, 1956 S.L.T. 24 the panel had been indicted on a charge of murder and on his behalf at the trial it was contended that he was of diminished responsibility, being under the influence of drink. Lord Hill Watson, in charging the jury, laid down that " if a man is not shown by the evidence to be within the category of one with a diminished responsibility when sober, he cannot place himself within the category of diminished responsibility by taking drink." A man cannot, in short, bring himself within the privileged category of diminished responsibility by taking drink. This is manifestly good sense and, it is thought, good law. It is consistent with the leading case of *D. P. P.* v. *Beard* [1920] A.C. 479 that drink is no excuse or defence unless it has produced a state of intoxication amounting to (legal) insanity. The panel's mental condition has to be judged as he is in the normal and sober state and he will thus be classified as normal and responsible, or of diminished responsibility, or insane and not responsible, subject to the proviso that drink may so affect a man of the first or second category as to take him into the third category. But drink cannot take him into the second category; that would be too much like a licence to commit crime, or at least murder, but to be sure to have had drink before doing it! His Lordship cited *Carraher*, 1946 J.C. 108, which was closely in point, being a case of psychopathic personality combined with drink, where also it had been held that the question of drink had to be considered separately. Public policy may underlie these decisions to some extent, and also the unwillingness to extend the protected class of partially responsible persons. It has to be remembered that the court is concerned not with moral responsibility but with the criminal liability, and loopholes of escape from that liability should not be readily allowed or too readily widened, particularly where any diminution of the power of self-control has been due to the panel's own actings.

D. M. W.

PRESCRIPTION —claim to heritage under will—non valens agere.

Pettigrew v. *Harton*, 1956 S.L.T. 25 raised some interesting issues in regard to heritable property. A mother died apparently intestate leaving a son and a daughter. The son was served as heir and completed title to the heritage. Twenty years later the daughter and her daughter together sought declarator that a holograph writing bequeathing them the heritage in life-rent and in fee respectively was a valid will, and also sought reduction of the son's title to the heritage and transactions following thereon. The Second Division held that the defender's plea of prescription must be given effect to and dismissed the action. On the facts there is much to be said for this: the alleged will had been found shortly after the mother's death and had been all the time in the pursuer's possession, but she had taken no steps to vindicate her claim. The equities were thus against the claimants. On the law it appears equally reasonable: a claim to heritage under a will, or rather a claim to set up as valid and effective a will whereby heritage is said to be bequeathed, is not a right of property in land but only a personal right: hence it is liable to be cut off by failure to claim during the running of the long negative prescription. The pursuers sought to overcome the prescription difficulty by pleading that the granddaughter had been *non valens agere cum effectu*, since she as fiar-designate could not have claimed the heritage in fee during the currency of the life-rent. But, as Lord Patrick pointed out, what excluded the fiar was the failure of both life-rentrix and fiar to attempt to set up the will as valid and to reduce the son's title. Another interesting point in the case was Lord Mackintosh's citation of Hume's *Lectures*, which goes some way to counter the observations of Lord Normand in *Fortington* v. *Kinnaird*, 1942 S.C. 239 on the value of such authorities. Hume was here cited and followed as much as any textbook might be. So too More's *Lectures* were cited, an interesting attitude, showing that these publications are of more than academic interest, though it remains true, as was observed in *Fortington*, that they may have to be accorded lesser weight in that they were not finally polished and published by the distinguished authors in their lifetimes. The moral of the case is surely plain, that persons must not sleep on their claims.

D. M. W.

CROWN—privilege—precedent.

It was sometimes thought in the years after 1947 that the Crown Proceedings Act of that year had very largely taken away the privileges of the Crown in litigation. But it has become apparent that one right remaining (and expressly preserved by the Act) is of great importance as a Crown privilege, which, prima facie necessary and innocuous, may be used so as to deny complete inquiry into facts in cases where the reason for the denial is not at once apparent. Glasgow Corporation brought an action against the Central Land Board for reduction of certain determinations made by the Board as being *ultra vires.* Proof before answer was allowed and the pursuers sought a diligence for the recovery of certain documents in the hands of the defenders and of the Inland Revenue. The Central Land Board claimed to be a Department of the Crown and thus entitled to the Crown privilege against disclosure, and the Secretary of State for Scotland granted a certificate that the disputed documents were of a class which should be withheld from production for reasons of the " proper functioning of the public service." The Lord Ordinary and the First Division gave effect to the objection (1955 S.L.T. 155). An appeal to the House of Lords has now been dismissed (1956 S.L.T. 41), it being held that the Central Land Board was a function or emanation or representative of the Crown and so entitled to take the objection. On the terms of the Act this is a reasonable reading, even if the consequences are somewhat unfortunate. Secondly, it was held that on the Scottish authorities the Court of Session still had its inherent jurisdiction to override an objection to the production of documents taken by a Minister on the ground of public interest. It was very welcome to have the House recognise (i) that the common law of Scotland differed from that of England in regard to the liability of the Crown and the right to the recovery of documents in the hands of the Crown, (ii) that the law of Scotland was not directly under review, though adverted to, in the leading English case of *Duncan* v. *Cammell Laird & Co., Ltd.* [1942] A.C. 624, which settled that an objection validly taken was conclusive of the matter, and (iii) that though it might be desirable that in matters of constitutional importance the law of the two countries should not differ (why not?) the law of Scotland could not properly be finally determined by a decision in an English appeal unless the case arose upon the interpretation of a statute common to both countries. The authoritative recognition of the first and third of these points is of great importance and value. A decision, even of the Lords in an English case, is not *binding* in Scotland unless arising from the interpretation of a statute common to both countries; it is only persuasive, and less persuasive in matters where the two systems differ or if Scots law is not argued (and, one might add, by counsel competent to do so) before the court. In the result, however, the House declined to override the objection and order production but it is important to note that Lord Radcliffe sounded a warning against what is a real danger and much to be feared, that the Scottish courts will continue to have this power in theory but never exercise it. He said: "But I should think it a very great pity indeed if a power of this kind, a valuable power, came to be regarded as a mere ghost of a theory having no practical substance, and if the courts abdicated by disuse in the twentieth century a right of control which their predecessors in earlier centuries have been insistent to assert." He added that the instant case came very near to inviting an exercise of the power in that nothing of high politics, diplomatic relations or State secrets could be involved. He further adverted to some of the cases (*Ellis* v. *Home Office* [1953] 2 Q.B. 135; *Smith* v. *Lord Advocate*, 1953 S.L.T. (Notes) 74; *Broome* v. *Broome* [1955] P. 190) which suggest that the objection on the ground of public interest is all too liable to be adduced by a Department simply to avoid having to disclose the files. This departmental attitude requires a rebuff: there is no value in giving a right to sue the Crown if the Crown can withhold evidence necessary to enable the claim to be substantiated. We may nevertheless be grateful for judgments of the highest authority which examine the authorities so carefully and lay down the law in such a satisfactory manner. It is now to be hoped that a case will arise where a judge can clinch the matter by exercising his discretion to override the Crown's objection lest the fallacy arise that the overriding power is in desuetude. Particular cases, of course, require special consideration and in the circumstances of *McKie* v. *Western S. M. T. Co.*, 1952 S.C. 206 it is hard to deny that the court had grounds for refusing to order the disclosure of police reports. In all such cases the court will be faced with a more or less difficult conflict of interests, the interest of the individual to have produced evidence necessary for the making out of his case, and the interest (which admittedly does exist and is sometimes highly important) in the secrecy of official records and departmental files. But officials should not be encouraged to think that what they write will *never* have to be disclosed. The Crichel Down inquiry was damaging to the myth of the civil servant's impartiality. Not least satisfactory in this case is the recognition that Scots law was different from English and more favourable to the subject prior to the 1947 Act and in this respect it is still rather more favourable.

D. M. W.

In *Glasgow Corporation* v. *Central Land Board* [1] the House of Lords declined to apply to Scotland the rule it had laid down for the English courts in 1942 in *Duncan* v. *Cammell Laird*.[2] It dealt, incidentally, with the rules of judicial precedent to be applied when the House has pronounced on a question in an appeal brought from one national jurisdiction (Scottish or English) and the same question subsequently arises in the other. Though the matter *sub judice* was not expressly stated to have been a "general principle of jurisprudence," it seems to have been assumed by their Lordships in 1942 that the laws of Scotland and England were the same regarding the powers of the courts to override the Crown's claim to exclude evidence on grounds of public policy. The House (including two Scottish Lords of Appeal, Lords Thankerton and Macmillan) had relied substantially on the decision of Lord Eldon in the Scottish appeal *Earl of Home* v. *Vass* [3]—though this case had in effect been ignored by subsequent Scottish practice.

Eminent judges, such as Lord Dunedin, Lord Porter and Lord Wark, had previously considered that, if the House of Lords regards a question before it to involve a principle of jurisprudence common to Scottish and English law, the decision *must* be followed in both countries and by the House of Lords itself in a subsequent appeal—notwithstanding the fact that the subsequent appeal originated from a different national jurisdiction.[4] Such a rule cannot, however, be supported on principle. Unless there has been argument by counsel qualified to speak with authority on the specialties both of Scottish and English law, the House of Lords is not in a position to decide whether the question *sub judice* is in fact one "of general jurisprudence" common to Scotland and England. Nor does the fact that eminent Scottish and English judges sit together to determine such questions obviate the need for critical analysis from the Bar. The House of Lords, it is thought, cannot validly declare a matter to be one of common or general jurisprudence when in fact the solutions or principles of Scotland and England may be different.

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[1] 1956 S.L.T. 41; in Court of Session, 1955 S.L.T. 155.

[2] [1942] A.C. 624.

[3] 1 Sh.App. 229.

It would seem more reasonable to hold that the courts of Scotland or England—though not *bound* to do so—may be *justified in departing* from their previous interpretation of the law so as to reflect the opinion of the House of Lords pronounced in an appeal originating from a different national jurisdiction. Professor Glanville Williams put the point concisely from the viewpoint of an English lawyer[5]: "A decision of the House on appeal from Scotland, if decided on the same principles as apply in English law, ought to be as good an authority as a decision of the House on appeal from England, *if the latter court* (*i.e.*, English court) *chooses to regard it as such*." To like effect is Gloag and Henderson.[6] The courts in Scotland and England will, of course, always consider with respect a decision of the House of Lords which has dealt with a question which subsequently comes under consideration in a different jurisdiction.

This interpretation of House of Lords' precedents is now supported by the opinions delivered in *Glasgow Corporation* v. *Central Land Board*.[7] Lord Simonds observed[8]: "What is the impact upon that (Scots) law of the decision in *Duncan's* case?

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[4] See authorities discussed by the present writer *Doctrines of Judicial Precedent in Scots Law*, pp. 54 *et seq.*; *Development of the Laws and Constitution of the United Kingdom*, Part II (Scotland), pp. 629–30; also Glanville Williams (1942) 6 M.L.R. 80; Salmond, *Jurisprudence*, 10th ed., pp. 180–181; *cf.* Hughes, *Jurisprudence*, p. 224.

[5] *Sup. cit.* present writer's italics.

[6] Gloag and Henderson, *Introduction to the Law of Scotland*, 5th ed., p. 11.

[7] *Sup. cit.*

[8] At pp. 42–43.

At once it must be said that that decision was given upon an English appeal, in which the law of Scotland was not directly under review, that the common law of Scotland differs from that of England in regard to the liability of the Crown to be sued and has developed independently in regard to the right of discovery or recovery of documents in possession of the Crown, and that, desirable though it may be that in matters of constitutional importance the law of the two countries should not differ, yet it would be clearly improper for this House to treat the law of Scotland as finally determined by a decision upon an English appeal unless the case arose upon the interpretation of a statute common to both countries. . . . I come, then, to the conclusion upon this aspect of the case that the observations in *Duncan's* case must, so far as they relate to the law of Scotland, be regarded as *obiter dicta.* They are entitled to the more respectful consideration because two noble and learned Lords well versed in the law of Scotland concurred in them. But they are not decisive and if, apart from them, your Lordships would come to a different conclusion, you are, in my opinion, well entitled to do so." Lord Normand declared [9]: "*Duncan's* case was an appeal from the English Court of Appeal and in it no question of Scots law fell to be decided. It is not binding on the Scottish courts nor, of course, on this House sitting as a court of ultimate appeal in a Scottish case. What was said in *Duncan's* case about the law of Scotland was said *obiter*, and, though it is not binding on the House, must receive the most respectful consideration." Lord Radcliffe, Lord Keith and Lord Somervell of Harrow concurred in these views.

Lord Simonds' *obiter dictum*—which seems to agree with the statement of law contained in Gloag and Henderson [10]—that a case determined by the House of Lords in an English appeal upon the interpretation of a United Kingdom statute is binding on a Scottish court—may be doubted. The same objections apply to such a doctrine as to the view that alleged "general questions of jurisprudence" may be determined conclusively for Scottish and English law by the decision of the House of Lords in an appeal from one jurisdiction only. Very often, of course, the persuasive effect of the House of Lords decision interpreting a United Kingdom statute may be overwhelming—as it may indeed be on a point of general jurisprudence not based on statute.[11] There are, however, cases where latent specialties of Scottish and English law may not be apparent, and where it would be unjustifiable to preclude the possibility of further argument. Even in questions of statutory interpretation the Courts of Scotland and England should surely not be absolutely bound, if some important specialty of either system has been passed over *sub silentio*, to follow the decisions of the House of Lords sitting as the final appellate court from the jurisdiction not immediately affected. Nor, of course, should the House of Lords itself be bound by its own previous interpretation pronounced in an appeal originating from a different jurisdiction. The persuasive authority of such decisions will always be very considerable, but to regard them as absolutely binding would be to give undue weight to decisions which were reached *ex parte* so far as the jurisdiction indirectly affected is concerned.

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[9] At p. 46.

[10] *Sup. cit.*

T. B. S.

2. ENGLISH CASES

NEGLIGENCE—fault of omission—rule in Morton v. Dixon 1909 S.C. 807.

Morris v. *West Hartlepool Steam Navigation Co., Ltd.* [1956] 1 W.L.R. 177 is of interest owing to its application to English law of the rule in *Morton* v. *Dixon*, 1909 S.C. 807 as restated by Lord Normand in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382. It also illustrates how, even accepting the rule, judges can arrive at different conclusions. In this case a seaman, sent down to fetch timber from the 'tween decks of a ship, fell forty feet into the hold from some unexplained cause. In an action by him against the shipowners the latter relied on evidence to suggest that there was a general practice in ships at sea not to erect guardrails in similar circumstances. The question accordingly was whether the defendants could be held liable on the basis of the second part of Lord Dunedin's dictum, the suggested precaution of fencing being " so obviously wanted that it would be folly in anyone to neglect to provide it "; or whether the precaution was " one which the reasonable and prudent man would think so obvious that it was folly to omit "—to use Lord Normand's phrase in *Paris*.

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[11] But see *Assessor for Aberdeen* v. *James Collie*, 1932 S.C. 304; 1932 S.L.T. 128. Here the Lands Valuation Appeal Court, though its decisions are not subject to review in the House of Lords, went so far as to depart from its previous interpretation of the Scottish Act to conform with the construction by the House of Lords of the equivalent English statute—*Finn* v. *Kerslake* [1931] A.C. 457. It may be observed, however, that Lord Hunter had dissented in the earlier Scottish case and in *Collie's* case had gained powerful support for his own construction. It is thought that Lord Sands overstated the situation when he regarded himself as bound by the decision in the English appeal.

Lord Morton of Henryton adopted the view of Lord Cooper in *Gallagher* v. *Balfour Beatty*, 1951 S.C. 712 that Lord Normand had not sought to qualify Lord Dunedin's original dictum and that his statement " reverts to the forcible language of the original formula." So, too, apparently did Lord Reid. But what constitutes " folly " in any particular case is not so easy to determine. Lord Morton and Lord Porter considered that it was not folly to neglect to provide guardrails and that the evidence led was too slender a basis for finding negligence against the defendants. Lord Porter said " To my mind, having regard to the practice, the omission to fence was neither imprudent nor unreasonable, much less an act of folly." Lord Reid, however, pointed out that in *Paris* it was regarded as " folly " to neglect to provide a one-eyed man with goggles when it was proved to be the practice not to wear goggles at such work. He considered that the defendants were liable in the present case and propounded the following test of liability: " Apart from cases where he may be able to rely on an existing practice, it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution . . . once it is established that danger was foreseeable and therefore that the matter should have been considered before the accident, it appears to me that a reasonable man weighing these matters would have said that the precaution clearly ought to have been taken." With great respect to his lordship, surely this test is less stringent than what was meant by Lord Dunedin in *Morton* and Lord Cooper in *Gallagher*. Lord Tucker and Lord Cohen agreed with Lord Reid that the appeal should be allowed (in which respect the rubric in the Weekly Law Reports appears to be erroneous)—so that theirs formed the majority opinion.

W. A. E.

DAMAGES—Loss of earnings—Whether incidence of taxation to be taken into account.

Probably the most important English decision during the previous quarter, from the viewpoint of the Scottish practitioner, is *British Transport Commission* v. *Gourley* [1956] 2 W.L.R. 41. This decision has already occasioned two learned articles (1956 S.L.T.(News) 9 and 13). Although it may not be strictly binding upon the Scottish courts it is undoubtedly of great persuasive authority following as it did the decision of Lord Sorn in *M'Daid* v. *Clyde Navigation Trustees*, 1946 S.C. 462. It must also be borne in mind that a Scottish appeal on the same point is likely to result in a similar decision.

In *Gourley* the plaintiff was awarded £37,720 for loss of past and prospective earnings sustained when he was severely injured in a railway accident. In disputing *quantum* of damages the defendants contended that in assessing the plaintiff's financial loss, the court should take into account the incidence of income and surtax which he would have had to pay on his earnings if he had not been injured. On such a basis the plaintiff's claim for loss of earnings amounted to only £6,695—a considerable difference to disregard which (in Lord Sorn's words) would have been "out of touch with reality." The House of Lords held (Lord Keith of Avenholm dissenting) that the judge of first instance should have taken into account the tax position and that the award for loss of earnings should accordingly be reduced to the lower figure.

The contrary view is certainly entitled to the greatest respect and has been championed by Professor T. B. Smith in the second of the two articles referred to above. No doubt the rule now laid down in *Gourley* may prove difficult to apply in practice and may even hasten the end of our civil jury system—the function of juries having become altogether too complicated for the average layman. There is something, too, to be said for leaving it to the legislature to tax the *surrogatum* for income ordered by the court in certain cases. But nevertheless, on the basis of the existing law, *Gourley* seems to be an eminently reasonable solution. It is with respect difficult to describe the incidence of taxation upon an injured plaintiff as *res inter alios acta* where the question is how much an unsuccessful defendant should pay to make good the financial loss which the plaintiff has actually sustained. Such loss can only be net loss and to hold otherwise would be "out of touch with reality." What surely is irrelevant is to consider whether the legislature ought or may be expected at some future date to tax the *surrogatum* for income. Professor Smith argues that the State is now precluded by the new rule in *Gourley* from demanding an appropriate contribution in respect of the *surrogatum* because all awards will now be made on a net basis. But surely the legislature, if so disposed, can overrule *Gourley* at the same time as making the *surrogatum* subject to income and surtax. This would seem to be the fairest solution. But viewing the present legal position the revenue does not benefit anyway and it seems wrong that an injured plaintiff can be "restored" at the defendant's expense to a better position than he occupied before the accident as a taxpaying earner of wages. Of course the defendant benefits thereby but it is logical and fair that he should do so when he is only liable for the actual financial loss which the plaintiff has sustained.

W. A. E.

RES IPSA LOQUITOR.

The question what exactly defendants must prove to escape liability in a *res ipsa loquitur* case has been the subject of conflicting judicial opinions and more than one explanation has been advanced as to what exactly Lord Dunedin meant in *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43. Accordingly, the views of Evershed M.R. on this question in *Moore* v. *R. Fox & Sons* [1956] 2 W.L.R. 342 are of more than passing interest. In this case a workman was killed by the explosion of a gas heated tank filled with liquid chemicals, the gas being thermostatically controlled. It was held that the doctrine of *res ipsa loquitur* applied. Before the trial judge the defendants led expert evidence to the effect that no explanation could be given for the accident and the judge, founding upon *The Kite* [1933] P. 154, concluded that the defendants had successfully discharged the *onus* cast upon them by the legal presumption *res ipsa loquitur.* The Court of Appeal, however, took a contrary view and Evershed M.R. said the defendants could not discharge the *onus* upon the basis of what were in effect merely scientific hypotheses or by showing that the accident might have occurred for more than one reason some of which were consistent and some inconsistent with negligence. His lordship considered that Lord Dunedin's language in *Ballard* (which on one interpretation could be said to support the views expressed in *The Kite*, the latter being ostensibly founded upon Lord Dunedin's dictum) was really only intended to cover the circumstances which in any given case give rise to the proposition " res ipsa loquitur " than to the consequences which properly follow when a case of *res ipsa loquitur* has once been established. He said: " I cannot think that he intended to lay it down that where the event is shown to be such upon a true analysis that the thing speaks for itself, the defendants can nonetheless discharge the onus upon them by proffering explanations of which the most that can be said is that some, at least, are consistent with the absence of want of care."

Evershed M.R. then went on to explain what the defendants must prove in cases of this nature. Founding upon the opinion of Asquith L.J. in *Barkway* v. *South Wales Transport Co.* [1949] K.B. 54 and Lord Radcliffe in another recent case *Esso Petroleum Co., Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, he indicated they must prove (1) what caused the accident, (2) that this cause was not due to their negligence and that they took all reasonable precautions to prevent it.

W. A. E.

NEGLIGENCE OF SERVANT —Liability to master for damages paid by him to third party on account of servants' negligence.

Romford Ice and Cold Storage Co., Ltd. v. *Lister* [1955] 3 W.L.R. 631 is important for deciding that a master who has been found liable to a third party for damages caused by his employee's negligence can recover the damages from the employee on the ground of his breach of an implied term in his contract of service—namely to do his work with reasonable care. This decision is a powerful weapon in the hands of employers or their insurers where an employee is thought to be in league, for the purposes of the litigation, with the person he has injured. But it is to be hoped that in the interests of good industrial relations employers' insurers will not force too frequent use of it. *Romford* is also an interesting case for the prominence given to the insurance position although in the result the majority of judges disregarded the question.

The defendant was a lorry driver employed by the plaintiff company and was sent with his mate to collect offal from a slaughter-house. Whilst in the yard of the slaughter-house he negligently backed his lorry into and injured his mate—who happened to be his father. In a separate action the father recovered a sum of £1,600 from the company who in the present case now proceeded to sue the son for the £1,600 they had had to pay his father on account of his negligence; or rather it was really the employer's general insurers who instigated the action in the name of the company as nominal plaintiffs (and apparently contrary to the latter's wishes) doubtless in annoyance that the separate insurers of the lorry were under no liability to pay under the terms of their policy as the accident had not occurred on the highway.

The Court of Appeal held (Denning L.J. dissenting) that the nominal plaintiffs were entitled to recover the sum sued for (for the benefit of their insurers) as their employee had broken his implied promise to drive their lorry with reasonable care and skill. They also considered that the employers were not joint wrongdoers with their employee preventing a right of relief except where permitted by statute.

Denning L.J. took the view that the nominal plaintiff's case could not succeed under breach of contract as there was an implied contract by the employers not to sue their servants in respect of negligent acts whose consequences were covered by insurance. But it seems impossible to read such an implied term into the contract of service though there may be grounds for employees organisations seeing that such express terms are embodied in future. As regards tort he considered that the employers were not just vicariously but directly liable and as such were joint tortfeasors who were not entitled to a relief or indemnity at common law and still less to any discretionary indemnity or apportionment under the Law Reform (Married Women and Tortfeasors) Act, 1935.

W. A. E.

INTERPRETATION—" Ordinarily resident " —Matrimonial Causes Act, 1950, s. 18 1 (b).

Section 18 (1) (*b*) of the Matrimonial Causes Act, 1950 (whose counterpart for Scotland is section 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949), provides that the court will have jurisdiction to entertain divorce proceedings by a wife who is resident in England and has been ordinarily resident there for a period of three years immediately prior to the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. In *Lewis* v. *Lewis* [1956] 1 W.L.R. 200 a wife founded on this section and on October 5, 1954, filed a petition for divorce against her husband, who was then a domiciled Australian. At this date she had been living for 2 years 11 months in England but prior to that had been living with her husband in Australia since March, 1951. The court held that the wife's temporary sojourn in Australia did not interrupt her ordinary residence in England and, in any event, that when her ship home cast her moorings at Sydney, English residence was immediately resumed, providing a clear *triennium*. The latter and, at first sight, somewhat startling proposition was justified on the ground that as the wife was not a nomad she must be ordinarily resident somewhere. And when she boarded the ship to come home her " ordinary residence " was obviously in England.

Interpretation of this statutory phrase is likely to become of increasing importance. Its interpretation in this case seems almost to equiparate a wife's " ordinary residence " with what would be her domicile if she had not acquired a derivative domicile from her husband. But the judge did not actually say so in so many words.

W. A. E.

GOLD CLAUSES.

The decision of the Lord Chief Justice in *Treseder-Griffin* v. *Co-operative Insurance Society, Ltd.* [1955] 3 W.L.R. 996; [1955] 3 All E.R. 793 is of especial interest to those members of the legal profession who negotiate long leases and other continuing contracts in this era of creeping inflation and currency depreciation. At a conservative estimate, sterling is at present losing its value at the rate of approximately 50 per cent. every fifteen years, and, if this rate continues, not many more years will pass before landlords and other creditors will be driven to seek some means of protecting their interests.

Gold clauses, although familiar in international contracts and in United Kingdom legislation based on international agreements, are so much strangers to the everyday business of this country that Lord Goddard, in his judgment in this case, remarked, " So far as I am aware, this is the first time that this class of clause has been the subject of litigation between the parties to what I may call a domestic contract, by which I mean parties who are both British subjects and domiciled in Great Britain."

Briefly, the facts were that on December 30, 1938, certain premises were let for a term of 99 years computed from June 24, 1930. The reddendum clause stipulated for payment of the rent, which amounted to £1,900 per annum payable quarterly, " either in gold sterling or Bank of England notes to the equivalent value in gold sterling." Until Michaelmas, 1953, the plaintiffs had always accepted £475 as a quarterly payment; at the same time, they stated that this was without prejudice to future claims under the clause referring to payments in gold or its equivalent in notes. Subsequently, they sought to bring the clause into operation.

His Lordship found " gold sterling " a somewhat unusual expression, and after reviewing various statutes relating to coinage and currency, held that the expression should be read as meaning gold coin, and that the object of the clause was to protect the creditor . . . against depreciation of the currency. " It was intended to put the landlords in the same position as if the quarterly payments of £475 had been made in gold coin." This would relieve the creditor of some of the hardships resulting from a depreciating pound sterling.

Applying Lord Wright's dictum in *New Brunswick Ry. Co.* v. *British and French Trust Corporation, Ltd*. [1938] 4 All E.R. 747; [1939] A.C. 1, " If sterling should depreciate, as it has done, relatively to the specified gold coin, £100 merely provides a measuring point or yardstick from which to determine how many units of currency will have to be paid to correspond to the gold value at the due date," the Lord Chief Justice was of the opinion that the plaintiffs were entitled to receive quarterly as many banknotes as would be needed to buy gold coins to the value of £475 from an authorised dealer. He concluded by remarking that his judgment would no doubt be considered by the Court of Appeal, and possibly by the House of Lords. Since some arrangement to protect creditors is in the long-term interest of the whole community, vast amounts of capital being tied up in long leases and contracts of a similar nature, the guidance of their Lordships in the event of appeal would be most useful to the business community and the legal profession.

POST-SCRIPT

This decision was reversed in the Court of Appeal on March 20, 1956, by Denning and Morris L.JJ., Harman J. dissenting [1956] 2 W.L.R. 866; [1956] 3 C.L. 413b.

Both Denning and Morris L.JJ. distinguished *Feist* v. *Société Intercommunale Belge d'Electricité* [1934] A.C. 161. They held that in *Feist's* case the clause fixed the amount to be paid, but that here reference to " gold sterling " was merely a reference to the *mode* of payment. Denning L.J. considered that a gold clause in a domestic transaction might be unlawful, as it is in Canada, France, and the United States, being damaging to the credit of the currency. Gold coins in this contract must be regarded as currency, not as a commodity, and so should not be treated as worth more or less than the true lawful value imported by their denomination.

Reference was made to section 6 of the Coinage Act, 1870. Denning L.J. held that while it does not prevent stipulations for payment in kind, it requires a money rent to be expressed in terms of a sum of money in lawful currency; a rent which could only be calculated by reference to the fluctuating bullion market would be uncertain; and it would thus be impossible to make " equal quarterly payments." Morris L.J. did not base his decision on this section, but on an analysis of the terms of the lease. He pointed out that there was no provision as to the weight and fineness of the gold sterling comparable with that in *Feist's* or the *New Brunswick Ry. Co.'s* cases, so that if gold coins denominated in pounds or half pounds came into use of weight and fineness other than that laid down in the Coinage Act, 1870, the indebtedness could be discharged by payment of £1,900 in such coins.

After considering various interpretations of the word "value" he concluded that in this context it denoted nominal value, and that difficulties and anomalies would arise if it were construed as denoting the selling price of sovereigns.

Harman J. in his dissenting opinion did not find the terms obnoxious to the provisions of section 6, and held that the reference to gold was merely a *measure* of the extent of the obligation. Following Lord Wright in *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [1943] A.C. 507; [1943] 2 All E.R. 406, he considered that a reference to a particular weight and fineness of gold was not essential. He would however have varied the Lord Chief Justice's order, in view of the fact that the value of sovereigns is affected by special influences at present operating in the Middle East, and substituted some such words as "such sum in Bank of England notes as represents the value of the gold content of 475 sovereigns calculated at the London rate current at the date when payment is due."

The court granted leave to appeal to the House of Lords.

H. McN. H.

3. PRIVY COUNCIL CASES

TAX: Whether Fifo or Lifo method applicable.

Minister of National Revenue v. *Anaconda American Brass, Ltd.* [1956] 2 W.L.R. 31, was an appeal from a majority judgment of the Supreme Court of Canada, dismissing an appeal by the Minister from a judgment of the Exchequer Court of Canada which had allowed an appeal by the respondent company from an assessment made for its 1947 tax year pursuant to the provisions of the Excess Profits Tax Act, 1940. The substantial question on the present appeal was whether, as the Minister contended, in estimating the cost of the metals which the company used during the year the first metals which the company bought would be the first metals which it used, known as the first-in-first-out, or Fifo, assumption, or whether, as the company contended, as being the modern accounting practice, the last costs incurred in buying the metals were the first costs charged, known as the last-in-first-out, or

Lifo, method. The company carried on the business of buying metals, manufacturing them into sheets, rods and tubes, and selling the manufactured products. On assessing the income tax and excess profits tax of the company for the year 1947 the Minister increased the amount of taxable income which the company had declared by a certain sum as the result of reducing the cost which the company attributed to the metals used during the year. The effect of increasing the taxable income was to increase the excess profits tax and the income tax of the company for 1947. Only the excess profits tax was in issue in this appeal, the parties having agreed as regards income tax to be bound by the outcome of this appeal.

Section 3 of the Excess Profits Tax Act, 1940, provided that a tax should be assessed in accordance with the rate set out in the second schedule on the excess profits of every corporation or joint stock company ordinarily resident or carrying on business in Canada. The rate was 15 per cent. of the excess profits, and " profits " was defined to mean for any taxation period the amount of net taxable income for the same period as determined under the Income War Tax Act. Under that Act income was defined as meaning the annual net profit or gain ascertained and capable of computation as being the profits from a trade or commercial or financial or other business.

The company was constantly buying metals to replace those being used. Its practice was to make an estimate at the beginning of each month of the quantity of metals which would be used during the next month and to order from its suppliers the same quantity to replace such metals. It maintained an inventory or stock of metals of about one-third to one-quarter of its annual requirements, so that it turned over its inventory three or four times a year. The company did not keep records from which the actual metals used during the year could be identified or the amounts paid for those metals determined. But it kept records of the quantities of metals (a) in its inventory at the beginning of the year, (b) bought during the year, (c) in its inventory at the end of the year. It also kept records of the prices paid for the metals bought from time to time. Thus, in 1947 the company knew what stock it had in hand at the beginning, what stock it had bought during the year, and what stock it had in hand at the end of it. It also knew what prices it had paid during the year for the metals which it had bought. But it did not know and could not ascertain either in respect of all the metals which it used during the year what price had been paid for them; or in respect of all the metals which it had at the end of the year what price had been paid for them. Yet to determine its annual profit or gain for 1947 it was necessary to ascribe the proper cost to the metals used and the proper cost or value to the metals remaining in stock. In the absence of knowledge an assumption or estimate must be made, and it was at that stage that the difference between the parties arose.

Lifo did not mean that the metal last to be received into stock was in fact the first to be processed and sold. On the contrary, the actual physical flow of the raw material was regarded as irrelevant; that which was bought in previous years and was in stock at the opening of the relevant financial year or that which had been bought during that year might have been processed and the products sold during that year: that was of no account. It was to cost that Lifo looked, and in the simplest terms it meant that the cost a pound of the metal most recently bought and added to stock was the cost a pound of metal content to be charged against the next sale of processed metal products. In 1947 there had been large increases in the price of metals, and for the purposes of determining its annual profit or gain for income tax purposes for the year 1947 the company, in the absence of knowledge of the proper cost to be ascribed to the metals used during that year and the proper cost or value of the metals remaining in stock, adopted the system of Lifo, which was, in the simplest terms, as set out above. In thus attributing the higher costs to the metals processed and the lower cost to those retained in stock the company was able to show far lower profits than if it had followed the accustomed or traditional method of return.

The Board stated that it was necessary to emphasise the words "for income tax purposes," as a large part of the argument had been devoted to showing that in Canada the Lifo method was in certain conditions a proper and generally accepted method of accountancy, and that those conditions were conspicuously present in this case. The Minister considered that, however appropriate the Lifo method might be for corporate purposes of the company, it did not truly reflect its profit for income-tax purposes. In adopting the Fifo method, which assumed that the metal first bought was the metal first used, he conceded that, in the absence of physical identification, some assumption about the material in fact used during the financial year must be made, and that in the closing inventory there might be some metal bought in previous years. He urged that the values of the stock-in-trade at the beginning and end of the period covered by the account should be entered at cost or market value, whichever was the lower; that for that purpose the actual stock in hand must be regarded and its actual cost so far as possible ascertained; and that an assumption or estimate was necessary only so far as ascertainment was not possible. On this basis, he said, the Fifo method more nearly than the Lifo method represented the facts and the true income of the company. The company contended that, inasmuch as the Income War Tax Act did not contain any definition of " annual net profit or gain," nor any direction how profits or cost of sales were to be ascertained, those matters could only be determined by the application of ordinary commercial principles except where expressly excluded by the Act; that the Exchequer Court had found not only that Lifo was an acceptable accounting method by which annual income for income-tax purposes was determined; but that it was the most acceptable method, and that the method which the Minister had adopted was not the proper one.

The Board held that the Fifo and not the Lifo method was the correct one in the present case. For many years before and ever since *Whimster & Co.* v. *Inland Revenue Commissioners* ((1925) 12 Tax Cas. 813) what was to be valued at the beginning and end of the accounting period had for tax purposes been taken to be the actual stock so far as it could be ascertained. In the present case there was a large quantity of metal in the 1947 closing inventory to which the 1936 cost was ascribed. Under the Lifo method, if the business continued and stock was carried forward, substantial purchases might never come into the profit account at all. The profit of a trade or business was the surplus by which the receipts from the trade or business exceeded the expenditure necessary for the purpose of earning those receipts (*Russell* v. *Town and County Bank* (1888) 13 App. Cas. 418, at p. 424). No assumption need be made unless the facts could not be ascertained, and then only to the extent to which they could not be ascertained. There was no room for theories as to the flow of costs, nor was it legitimate to regard the closing inventory as an unabsorbed residue of cost rather than as a concrete stock of metals awaiting the day of process. It was the failure to observe, or, perhaps, it should be said, the deliberate disregard of, facts which could be ascertained and which must have their proper weight ascribed to them, which vitiated the application of the Lifo method to the present case. It was the same consideration which made it clear that the evidence of expert witnesses, that the Lifo method was a generally acceptable, and in this case the most appropriate, method of accountancy, was not conclusive of the question which the court had to decide. The Exchequer Court might find that as a fact, and be affirmed by the Supreme Court. The question remained whether it conformed to the prescription of the Income Tax Act. In the opinion of the Board it did not. New theories of accountancy, though they might be accepted and put into practice by business men, did not finally determine a trading company's income for tax purposes. The appeal was accordingly allowed.

UNSAFE PORT: Damage to vessel.

Reardon Smith Line, Ltd. v. *Australian Wheat Board* [1956] 2 W.L.R. 403 was an appeal from a majority judgment of the High Court of Australia reversing a judgment of the Supreme Court of Western Australia in favour of the appellants in an action which they brought against the respondents for damages for breach of the latter's obligation under a voyage charterparty in ordering the appellant's motor-vessel *Houston City* to an unsafe port, Geraldton, in Western Australia, and to an unsafe berth there, to load a cargo of wheat. The vessel was severely damaged in the course of loading as the result of a storm which caused her to range heavily against the concrete side of the berth. A hauling-off buoy, for use when there were northerly winds, and about 50 feet of fender from the wharf were missing.

By the charterparty (clause 1) it was mutually agreed that the vessel being in every way fitted for the voyage, was with all convenient speed to proceed, as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereto as she might safely get, and there load according to the custom of the port, always afloat, at such safe dock, pier, wharves and/or anchorage, as ordered, a full and complete cargo of wheat in bulk, ex silo, which the charterers bound themselves to provide. By clause 7, if the vessel was proceeding in ballast the master was to apply to the charterers for loading port orders by wireless 96 hours before arrival at the loading area, and the charterers were to give orders for loading port by wireless within 48 hours of the master's application.

The Board stated that it was immaterial in this case whether one treated the allegation as coming under the words "safe port" or "safe wharves." The berth was exposed to northerly winds, but the evidence did not establish that it was ordinarily unsafe for such a vessel as the *Houston City*. Two defects relied on were the absence of the hauling-off buoy and the missing 50 feet of fender. The wind freshened from the north and during a gale the ship rolled and damaged herself and the wharf. Proceeding on the basis that the port or wharf was unsafe, the appellants' case on construction was that the charterers had undertaken to nominate a safe port or wharf for the loading, that in breach of that provision the port or wharf nominated was unsafe, and that if damage to the ship flowed from that breach as a natural and probable consequence the charterers were liable for it. The respondents did not, of course, suggest that the owners could be compelled to load at an unsafe port, but contended that, if the charterers nominated an unsafe port, the owners could reject the nomination, so soon, presumably, as they had discovered that the port was unsafe. They might be entitled to damages for delay caused by the nomination. If, however, they accepted the nomination and went to the port the charterers would, it was said, in no circumstances be liable for damage flowing from want of safety, unless liability arose under some other provision in the contract. The courts below found that the port or wharf was unsafe and that the master had acted reasonably in accepting the nomination.

The Board stated that there were no grounds for disturbing those findings. The rival contentions could be illustrated by citations, one from the majority judgment in the present case and the other from *Limerick Steamship Co.* v. *Stott & Co.*

[1921] 1 K.B. 568. In the view of the majority, clause 1 of the charterparty appeared " to be designed to define the obligations of the shipowner with respect to loading ports and to prescribe, consequentially, a limitation on the charterers' *rights* to designate such ports, though, no doubt, under that clause and clauses 6 and 7 the [charterers] were bound to give appropriate loading orders and provide the stipulated cargo. There is, of course, ample authority for the proposition that a failure or refusal, pursuant to such a provision, to designate a safe port will sound in damages and the nomination of an unsafe port may well be involved in such a failure or refusal. But it by no means follows that where the nomination of an unsafe port is involved in such a failure or refusal the shipowner may receive not only damages which flow from the failure or refusal but also damages sustained by the vessel after proceeding to the designated port and as the result of its unsafe nature and condition. Such damages do not flow from a refusal to nominate a safe port." In the *Limerick Steamship* case (*supra*) a second point was that the ship had been ordered to Manchester. After discharge she was unable to get down the canal without cutting her masts. The judge said: " In my judgment the expense of cutting the masts must fall on the charterers, because they were only entitled to order the *Innisboffin* to a safe port, which means a port to which a ship can safely get and from which she can safely return. It was therefore a breach of contract for the charterers to order her to proceed to Manchester, and having committed a breach of contract they must pay the damages which flow from that breach of contract."

The Board were unable to construe the clause as suggested by the majority judgment, which in effect made the nomination of an unsafe port equivalent in its legal consequences to a failure to nominate a port at all. That would seem to disregard the words and the realities of the relationship. The clause was an undertaking by the charterers to nominate a safe port and a safe dock, etc., within that port. They were given a choice, within prescribed limits, where they would have their cargo available for loading. It seemed natural that they should give some undertaking as to its safety, and that the owners should be entitled to rely on the place nominated being safe. If the charterers broke that undertaking and nominated an unsafe port, and the ship was damaged through going there, they would be liable for the damage, subject to any question of remoteness or of *novus actus interveniens*. If a charterer had any doubt as to the draught or dimensions of the ship as affecting its power to load safely at a particular port or berth, there was no difficulty in his getting any information he wanted from the owners. The charterers, having broken their undertaking to nominate a safe port or wharf, were liable for the damages to the vessel which flowed from the breach.

The Board approved the decision of Devlin J. in *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills, Ltd.* [1955] 2 Q.B. 68 (which was cited in the present appeal), and in which that judge felt unable to adopt the majority decision in the present case. The Board also adopted the dicta of Devlin J. (at p. 77) as to the position of a master if and when he realized or suspected danger or the possibility of danger at a nominated port. Where, as in *Lensen Shipping Co., Ltd.* v. *Anglo-Soviet Shipping Co., Ltd.* (1935) 40 Com.Cas. 320, a time charter contained an undertaking by the charterer that the vessel was to be employed between good and safe ports the liability of the charterer was in all ordinary circumstances the same as where under a voyage charterparty the charterer undertook to nominate a safe port. Other cases considered were *Samuel West, Ltd.* v. *Wright's, Colchester, Ltd.* (1936) 155 L.T.Rep. 421, and *G. W. Grace & Co., Ltd.* v. *General Steam Navigation Co., Ltd.* [1950] 2 K.B. 383. The appeal was accordingly allowed.

CRIMINAL LAW: Jury's view of locus.

Karamat v. *The Queen* [1956] 2 W.L.R. 412 was an appeal from a judgment of the Court of Criminal Appeal in the Supreme Court of British Guiana dismissing the appellant's appeal against his conviction of murder at the Criminal Sessions for the county of Demarara. The main defence of the appellant—who was indicted with five other persons all of whom were acquitted—was that he shot in self-defence. The others rested their case on an alibi, contending that they were not present when the shooting took place. Before the end of the case for the Crown the judge, pursuant to powers conferred by section 44 of the Criminal Law (Procedure) Ordinance (Laws of British

Guiana, 1930), which also provided that the practice and procedure in criminal trials, including that relating to juries, should conform as nearly as possible to that which obtained in England, directed a view of the locality which the jury and a number of witnesses attended. The appellant stated that he did not wish to attend the view and he did not do so. The basic submission on this appeal was that the view allowed nine witnesses for the prosecution, who had already given evidence, and had been cross-examined or re-examined and then remained in court and so heard the evidence of subsequent witnesses, to give further evidence both orally and by conduct before the jury. At the view any juror who wanted to ask a question put it through the judge, who was present the whole time and throughout had control of the proceedings, and the witness gave a demonstration as the answer, counsel then being invited by the judge to ask questions through him, but no cross-examination was allowed. The appellant contended, *inter alia*, that the " view " was not one authorised by the Ordinance when witnesses attended and indicated places by pointing or by words.

The Board did not accept that submission. They thought that the judge was perfectly right in deciding that witnesses who had given evidence could attend at the view. It was just those witnesses from whom the jury would desire to get ocular demonstration of their positions at the material times. The witnesses were illiterate and no doubt would have difficulty in explaining themselves and probably considerable difficulty in following a plan. To have held a view in their absence would have destroyed its whole value, for it would not have demonstrated to the jury just what they wanted to know. Witnesses who had already given evidence took part in the view in the sense of placing themselves in the positions in which they said they had been at the material times or indicating the positions of others, and that was unobjectionable. There was nothing to show that any more than that took place. If a view were ordered at some stage of a criminal trial in England, it would be no objection to a witness's attending and taking part that he had already given evidence. A view was part of the evidence, being in substitution for or supplemental to plans, photographs and the like. So long as the witnesses taking part were recalled for cross-examination, if desired, the Board were unable to see that the accused person was in any way prejudiced, but it was essential that every effort should be made to see that the witnesses made no communication to the jury except to give a demonstration. It was eminently desirable that the judge should be present and it is possible that, had he not been, a different result would have followed, but here everything was done in his presence and under his control.

It was strenuously argued before the Board that the absence of the appellant from the view was a fatal objection. The short answer was that under the Criminal Procedure Ordinance it was competent for the court to allow the accused to be absent during a part of the trial. As the court, on being informed that the appellant did not desire to attend, did not insist on his presence, that was equivalent to allowing him to be absent. In addition, if an accused person declined to attend a view which the court thought desirable in the interests of justice, he could not afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction, if one followed, though he could object if evidence were given outside the scope of the view as ordered. The appeal was accordingly dismissed.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate, Sheriff-Substitute of The Lothians and Peebles

CRICHEL DOWN

The Crichel Down case, which caused so much political stir a year or two ago, has not been forgotten. Although no corruption was disclosed, nor any large sum of public money squandered, and the principle of policy involved was scarcely of first-class importance, the circumstances were remarkable enough. Moreover, there is nothing which arouses feeling in this country more easily than an instance of abuse of power by officials. Since their numbers and influence have increased so much under the Welfare State, the public are even more sensitive than they used to be on the subject. Our civil service, it is often said, is the best in the world. But nobody could call it popular, and it has certain characteristics, for instance abhorrence of the limelight, which however admirable are apt to give rise to suspicion. The result of the inquiry conducted by Sir Andrew Clark Q.C. showed that this suspicion is not always unfounded. There could hardly be a more revealing exposure of the defects of the bureaucratic mind, usually so hard to penetrate. The cruellest maker of jokes against "the arbitrary incompetence of bureaucracy," proclaimed *The Times*, could not have invented Crichel Down. It is indeed the incompetence disclosed by the Clark Report which is so striking, even more than the lack of scruple in dealing with private persons and the light-hearted attitude to the spending of public funds, which were due to a great extent to the desire to cover up previous mistakes. The central feature of the whole story consists in the repercussions of a very misleading report prepared on inadequate information by a junior official as to the advisability of selling back to the Crichel estate land acquired before the war by the Air Ministry for a bombing range, a report which was accepted without any proper examination of the facts stated in it.

There are comments on the Crichel Down case by two contributors to the *Modern Law Review* for November 1955. Mr. J. A. G. Griffith recounts in detail the findings of the Clark Report and gives an outline of the political reactions and consequences. He thinks that the fundamental defect revealed was not a failure in the constitutional relations of those involved, nor the policy decisions made, nor the length of the struggle which Lieut.-Commander Marten had to wage. "It was in the method and therefore in the mental processes of the officials." Dr. R. M. Jackson points out that when the officials discussed among themselves the future of Crichel Down they assumed that, as it was Crown property, it could be dealt with in whatever way appeared most suitable, and they were quite entitled so to do. Contrary to the idea with which many people have become imbued, there was no question of overriding a citizen's legal rights.

Consequently, if there had been any provision for judicial review of the proceedings, the decision to sell the area to Crown Lands and the decision of Crown Lands to let it to a tenant selected by them could not have been contested as a matter of law. A demand for judicial review where no legal right is involved amounts, Dr. Jackson asserts, to a claim that any citizen should be entitled to arraign officials before a court on a charge of not doing their jobs properly, quite irrespective of whether that citizen has any *locus standi.*

Is it clear, however, that the previous owners of the land acquired by the Crown and the disappointed applicants for the tenancy of the land had no *locus standi*? Legally they had not, but at any rate morally they had good cause for complaining that they had not received proper and fair treatment. Persons whose legal rights are infringed by official decisions have already remedies against the executive, though perhaps the remedies are insufficient. A more acute problem is how to prevent the executive from acting in a way that is oppressive though not illegal. Dr. Jackson's view seems to be that where a Minister has a legally unchallengeable right to make a certain decision neither the decision itself nor the events leading up to it are reviewable. But this is surely an untenable view. The manner in which a decision has been reached is capable of being reviewed by a court, and not infrequently is reviewed, although the decision itself, if properly arrived at, is a matter solely within the Minister's discretion.

In most cases, no doubt, the only mode of appeal open to one who complains of an official act, which is of an administrative character, is by a political approach. He may resort, as Lieut.-Commander Marten did, to his M.P., and the M.P. may or may not be able to obtain satisfaction for him by going to an official or to the Minister. Suppose there is no response, or as in the Crichel Down case the political machinery is set in motion and produces an inadequate result based on mistaken facts, why should the aggrieved person have no means of redress? Even where it is effective the political method is not a desirable way of having departmental decisions reviewed, since it obviously lends itself to wire-pulling of a more or less respectable sort. Success may depend less upon the merits of the case than upon the influence exerted by the aggrieved person or his M.P. It is quite evident that had Lieut.-Commander Marten not been very pertinacious he would never have achieved what he did. If a tribunal or tribunals existed before which complaints against administrative acts could be brought, it would be possible to provide an alternative to the political approach and ensure that, even when a departmental decision could not be questioned on its merits, it should be based on an assessment of the correct facts and a full consideration of the interests of parties concerned. Sir Andrew Clark in his report on Crichel Down was able, as he was required by the terms of his appointment, to distinguish between matters of policy and other matters and to review the latter in a judicial manner. Why should the inquiry not have been held before the damage was done, and the scandal created, rather than subsequently, and then only because the Minister thought fit after considerable public criticism to appoint an independent person to investigate the whole affair?

Mr. Griffith's opinion that the fundamental defect disclosed in the Crichel Down case was a personal failure on the part of the officials concerned does not go very deep. The question is, why did they fail? It is hardly enough to answer that it is in the nature of human beings to be fallible. The five officials specially criticised by the Clark Report were not guilty of any very high degree of misconduct. Otherwise the consequences for them would have been more serious than merely the transfer of one of them to another position in the civil service. Nor perhaps were their faults altogether exceptional. How many officials, if all their actions and letters were scrutinised in the same minute way, would be found impeccable? The extent to which public indignation was excited by the case was partly due to a suspicion that a similar kind of treatment of citizens by civil servants occurs more frequently than it is detected. The lesson of Crichel Down is not that occasionally a few officials may fall below the high standards maintained by the majority, but that the new functions of the State and powers of its servants have led to new dangers both to the interests of private persons and to the proper working of the public service. Certainly the Clark Report showed that the size and complexity of the administrative machine is apt to produce confusion, inefficiency and injustice to individuals. It was observed by the committee appointed by the Prime Minister to consider the conduct of the officials criticised in the Report that some part of the deficiencies disclosed may have been due as much to the organisation of the Ministry of Agriculture as to the faults of individual officials.

The most important issue involved, however, is that of ministerial responsibility, which was discussed in the debate in Parliament on Crichel Down. The doctrine that Ministers should be solely responsible to Parliament for all that goes on in their departments is generally considered to be vital to the institution of parliamentary government. But there is a good deal of superstition on the subject. Everyone knows that in fact a Minister is, and can only be, aware of a fraction of the decisions taken by his subordinates. And even when he takes a decision in person the responsibility may be more nominal than real because he must rely for the facts on officials who may, as happened in the Crichel Down case, fail to supply him with the correct or complete facts. The basis of the doctrine is that the impartiality of the civil service could not be maintained and political criticism of it avoided otherwise. In some circumstances, no doubt, officials are so closely associated with the formulation and execution of a particular policy which is or may be the subject of parliamentary controversy that they would be compromised if the Minister or the head of the department were not obliged to take full responsibility for what they do. On the other hand, a great deal of the work of civil servants is of a sort which has no political implications at all, or at least none that identifies them with any party policy. Why should an official whose duty it is, for example, to administer Crown lands, have a different degree of responsibility for his actions from a member of the board of a nationalised industry, because the one is a civil servant and the other is not?

If there is any political principle which is fundamental, it is that power should not be divorced from responsibility. The position of the civil service is in glaring contradiction with this principle. However efficient and conscientious the majority of civil servants are, power without responsibility can scarcely fail to corrupt them in the long run, and Crichel Down is merely a sample of what might occur on a far more serious scale if the power of officials goes on increasing and methods of keeping them in restraint are unchanged. It is possible to believe that existing measures of internal discipline are not always adequate, where it is a question of abuse of power and even of personal misbehaviour, and that there is some tendency for officials to shield one another when one of them is in danger of getting undesired publicity. The cases of Crichel Down and of Burgess and Maclean go a long way to justify such a belief. Officials cannot become accountable for their actions so long as they are able to conceal themselves behind a smoke-screen of secrecy and anonymity, a practice which the doctrine of ministerial responsibility is calculated to maintain.

It may be granted that Ministers ought to be responsible for important decisions of policy not only where the real decision is theirs but where it is made by subordinates acting directly under their instructions. The transparent fiction that scores of decisions, of which Ministers know and probably understand nothing, are made by them has the natural result that it is impossible to identify the real authors or bring home responsibility to them. Thus, the Committee on Ministers' Powers recommended twenty-five years ago that the reports of officials or others appointed to conduct public departmental inquiries should be published. But this is still generally being refused, on the ground apparently that it would be embarrassing to a Minister if he were shown to differ from the opinion of the person conducting the inquiry, or, to put it perhaps more accurately, that it would be embarrassing to officials in the Ministry, deciding in the name of the Minister, if their rejection of the views of the person who conducted the inquiry became known. Why should a difference of opinion inside a Ministry not be disclosed, unless the public interest requires exceptional secrecy, as fully as a difference of opinion between judges in a dispute at law? The best safeguard against abuses of power is that persons who have to exercise a discretion should be identifiable and should exercise it openly, giving in ordinary circumstances their reasons. The aberrations of officials involved in the Crichel Down case could not have occurred if they had been obliged to make known the grounds on which they came to the conclusion that the land should not be sold back to the previous owners and should be farmed as a single unit by a tenant selected by the Commissioners of Crown Lands. It may be said that the final decision in such a case being one of policy for the political head of the Department to make, it would be impracticable for the reasons, including facts or opinions contained in confidential reports of subordinates, to be recorded in advance of the decision. Even if this is so, it would not appear to prevent disclosure after the decision to a dissatisfied party.

It is not as though civil servants would really suffer by becoming accountable for their actions to a larger extent than at present, except in so far as it would be a hardship to be deprived of the enjoyment of power without responsibility. In return they would probably gain in prestige and popularity. The benefits secured to them at present, and in particular their virtual security of tenure, would not be affected because they might be obliged to justify themselves like other persons in public positions.

HEARSAY EVIDENCE

What the soldier said, there is no doubt, may sometimes be evidence. The rule excluding hearsay is a general principle, the most important rule perhaps in the law of evidence, but like other general principles is subject to qualifications and exceptions. Opinions differ as to the scope of these qualifications and exceptions. Admissions by accused persons or parties in civil proceedings for instance, are often regarded by textbook writers as admissible by way of exception to the hearsay rule. Not all agree. Thus Lewis (at p. 133) treats as an exception to the hearsay rule in the proper sense only evidence of statements made by deceased persons, to which he adds statements made by the hopelessly insane (p. 134). It depends, of course, on whether the term "hearsay" is given a loose or a strict meaning. There seems, however, to be an advantage in defining it with Lewis strictly as second-hand and not original evidence, that is to say, evidence which consists of assertions as to matters of fact made by a witness in reliance not on his own knowledge and experience but on statements of other persons whether oral or written. A clear, or at any rate a comprehensible, distinction may be drawn between hearsay, as so defined, on the one hand and a wide class of statements on the other hand made by or utterances of persons other than the witness who is testifying. Reported statements coming within this latter class are often admissible, and it is a mistake to confuse them with statements which are inadmissible as hearsay, or would be if it were not for a special exception in certain circumstances to the hearsay rule. As far as admissions and confessions are concerned, they cannot be said to be admitted by way of exception to the hearsay rule unless they are used to prove the truth of the assertions of fact contained in them. But it is doubtful if that is ever the purpose for which they are admissible and it is certainly not always. Where, for example, an accused is found in possession of stolen property, and in answer to a charge states that he bought it from a man he did not know in a public-house, evidence that he made this answer serves, not to show how in fact he obtained the property, but to prevent him from putting forward a more likely explanation at his trial. No question of hearsay enters in.

Original as opposed to second-hand evidence may include reported statements, where these are not used to prove the truth of the assertions contained in them and it is relevant to show that the statements were made. Exceptions to the hearsay rule can, properly speaking, only cover instances where second-hand evidence is allowed, and not where reported statements are admissible as original evidence. Consequently, the arguments of textbook writers about the precise scope of the exception to the hearsay rule seem to be largely misdirected. It is possible with ingenuity, as Mr. Rupert Cross writing in the *Law Quarterly Review* for January, 1956, shows, to collect a large number of so-called exceptions to the hearsay rule, twenty or more in number, some of them exceedingly subtle. But it cannot be said, and he is far from maintaining, that the end of his examination of the hearsay rule will leave anyone clearer than he was at the beginning. The contrary, indeed, is rather the case.

Can it be that this depressing conclusion is not so much the fault of the case law on the subject as the result of asking the wrong questions? It is more fruitful, surely, to inquire whether a particular reported statement is original or whether it is second-hand evidence. On the answer to this question its admissibility as evidence generally depends. The problem is sometimes very difficult, because the distinction between the two sorts of evidence may be fine and also because a reported statement may be both original and second-hand at the same time. For example, it may be perfectly legitimate for the prosecution in a criminal trial to bring evidence that a person not called as a witness pointed to the accused and said "this is the man who did it," for the purpose of leading up to proof of the accused's reaction to the statement. But, of course, this evidence is at the same time hearsay of the worst kind. The most difficult problems usually arise when it has to be decided whether a reported statement should be treated as part of the *res gestae* or not. A recent Privy Council case from British Guiana, *Lejzor Teper* v. *R.* [1952] A.C. 480, provides an illustration. The essential facts were as follows: on a charge of arson of a shop a policeman gave evidence that a little less than half an hour after the fire started, at 2 a.m., and a furlong from the place of the fire, he heard an unidentified woman shouting "your place burning and you going away from the fire." Immediately afterwards the witness saw a car coming from the direction of the fire with a fair man in it who resembled the accused. The appellant in a statement to the police said that he had spent the night at home. The jury were told that though the evidence of the policeman was inconclusive they should consider it, along with other evidence, in making up their minds whether to accept the appellant's denial that he was at the scene of the fire. In fact, though there was some circumstantial evidence of insufficient weight involving the appellant, the only direct evidence of his presence in the neighbourhood of the fire, apart from the reported words spoken by the woman, consisted in the unsatisfactory identification of him by the policeman. The Board held that, since the woman's words, not being clearly associated with the action or event in time, place and circumstances, did not form part of the *res gestae*, evidence of them should not have been admitted, and the conviction was quashed.

The actual decision to allow the appeal in this case may not be open to criticism, but there are several things that might be said about the ground of decision. In the first place, can we be sure that the result would have been the same if the woman's words had been uttered nearer the place of the fire and three or four minutes, instead of twenty-six minutes, after it started? It is evident from the Board's approval of *O'Hara* v. *Central Scottish Motor Traction Co.*, 1941 S.C. 363; 1941 S.L.T. 202, where a statement by a bystander as to the cause of a traffic accident, made a very few minutes after the occurrence of the accident, was held to be admissible, that the interval of time and place may have been decisive. Where is the line to be drawn? Obviously there can be no mechanical test by the application of which only reported statements made so many minutes after and so many yards from the scene of an event shall be treated as part of the *res gestae*. In that case, we are thrown back on the principle laid down by Lord Ardmillan in *Longworth* v. *Yelverton*, 24 D. 696, and referred to in *O'Hara's* case, that where statements are so connected with the facts given in evidence that the dissociation of the statements from the facts to which they relate would frustrate the ends of justice and impede the discovery of truth, then the statements are admissible as part of the *res gestae*. This is so vague a principle that it is hard to see how it could serve to determine that the woman's words in *Teper's* case ought or ought not to be admitted.

Secondly, it is apparent that the Board considered the *res gestae* in *Teper* v. *R.* as having come to an end when the fire started. Why? Surely the whereabouts of the accused on the night in question, both before and after the start of the fire, fell within the scope of the matters under investigation. Suppose that the woman who uttered the words to which objection was taken had been called as a witness and said that she saw the accused in the car, her evidence would have been admitted to disprove the appellant's alibi. That being so, how could her reported statement made simultaneously with a relevant fact, namely the appellant's presence or absence in a particular place at a particular time, be rejected except on the sole ground that it was hearsay instead of original evidence?

The conclusion to which we are led is that the interval of time and place between the starting of the fire and the woman's exclamation can scarcely have been the only factor which the court had in mind in holding the evidence to be inadmissible. The reason usually assigned for rejecting hearsay evidence is that the person who made the assertion was not on oath and subject to cross-examination. There is another reason which might well be sometimes added, namely that, as a matter of experience, verbal statements are very commonly misunderstood and misquoted by those who repeat them. These objections applied forcibly to the words said to have been uttered in *Teper* v. *R.* The policeman might have mistaken the words he stated that he heard shouted, whatever the exact circumstances may have been. There was nothing to show how well the woman knew the appellant previously, or if she knew him at all, and her opportunity of identifying him would appear to have been limited. Logically, the decision that the woman's words were inadmissible as part of the *res gestae* was quite separate from the decision to allow the appeal, on the ground that the evidence was so prejudicial that the conviction could not stand. In fact, however, it may be permissible to suspect that in coming to the former decision the court was influenced by its view of the crucial character in the case of the disputed evidence, for it laid special stress on the need of searching cross-examination in questions of identification and on the absence of direct evidence of the appellant's presence anywhere in the vicinity of the fire on the night in question apart from the disputed evidence.

The Board appear to have accepted the woman's exclamation as being spontaneous in character, and they drew a distinction between it and a reported statement made with the purpose, for example, of bringing a man to justice, as in *R.* v. *Gibson*, 18 Q.B.D. 537. In that case a witness stated that immediately after he had been struck by a stone a woman, who was passing by, pointed to the accused's door and said that the person who threw the stone went in the door. It was pointed out also in *Teper* v. *R.* that the reported statement in *Gibson's* case, though closely associated in time and place with the event, was not directly connected with the event itself. In other words, what happened outside the accused's door after he went in was no part of the *res gestae* of the matter in issue. For both these reasons the note in 68 *Law Quarterly Review* at p. 434 to the effect that *Teper* v. *R.* and *R.* v. *Gibson* are on all fours seems to be mistaken. It would perhaps be wrong to say that any decision on *res gestae* is on all fours with any other.

The value attributed to spontaneity is shown by *A. B.* v. *C. D.*, 11 D. 289, an action of separation brought by a wife against her husband. The pursuer was found alone by a witness on one occasion after a quarrel with her husband in a state of great distress, and uttered an exclamation not addressed to the witness, as if giving way to her feelings. Evidence of her words was allowed to be given although they involved an assertion as to the cause of her distress, but the admissible evidence was limited to the terms of the exclamation and any detailed statement of facts made by the pursuer was excluded. It may be observed that, if the unknown woman's exclamation in *Teper's* case was not part of the *res gestae* there, it is difficult to see how the wife's exclamation, which was made at some undetermined period of time after the quarrel, could form part of the *res gestae* between the husband and wife in *A. B.* v. *C. D.* There was, indeed, an acute division of judicial opinion on this very point, the majority of the court holding that the exclamation was part of the *res gestae* between the witness and the pursuer, and Lord Mackenzie dissenting on the ground that it was not part of the *res gestae* between the pursuer and the defender.

In the case of reported statements which cannot be described as spontaneous exclamations, there may be other considerations arising from the nature of the statement and the circumstances of the person making it that will affect the decision whether to admit them or exclude them. Thus in *O'Hara's* case evidence of a statement made by a man who said he had just crossed the road in front of a bus was admitted to corroborate the driver's explanation why he suddenly swerved. It might be maintained that the distinction between this case and *R.* v. *Gibson* is that in the latter the woman's remark was presumably prompted by an ulterior motive, good or bad, whereas in *O'Hara's* case the man's statement was plainly disinterested, and in fact amounted to an admission of carelessness on his part. A similar reason perhaps accounts for the admission of a reported statement by a workman who fell into a bath of acid implying that it had been his own fault (*Davies* v. *Fortior, Ltd.* [1952] 1 All E.R. 1359).

Statements or other utterances which are contemporaneous with or precede a fact in issue do not on the whole present so much difficulty as those which follow it, no doubt because there is less danger of their being fabricated. But, of course, they may be also. In *R.* v. *Edwards*, 12 Cox 230, evidence was allowed to be led in a case of wife murder that the wife, shortly before her death, deposited an axe and a knife with a neighbour, saying that she felt safer without them because her husband kept attacking her with them. The decision has been criticised a good deal, and also defended on the ground that the deceased's statement was a verbal part of a relevant fact, namely, the deposit of the weapons. Mr. Cross thinks that, though evidence of the deposit and of the deceased's fear of her husband might be admissible, the neighbour should not have been permitted to state that the wife said she had been attacked by her husband. If, however, evidence of the wife's fear of her husband was admissible it might seem hard to exclude the words expressing that fear. Where a fact may be proved, it is perhaps legitimate to admit any statement explaining the fact, so long as it does not go beyond an explanation and become a narrative. The statement by the deceased woman in *R.* v. *Edwards* might be said to hover on the verge.

The greatest difficulty of all probably is caused by complaints made by injured persons referring to the cause of the injury. There is a well-defined class of cases, namely, sexual offences committed against women and children, where evidence of complaints is received for the purpose of proving the consistency of the injured person and of negativing consent. In other cases, evidence of complaints made in the absence of the accused or opposing party are probably not admissible unless they can be brought within the scope of the *res gestae*. If the question is asked how we are to know in advance whether the terms of a particular complaint (as opposed to the fact of the complaint being made) may be proved as part of the *res gestae* or are inadmissible, we are met with a hopeless divergence of opinion, hopeless, that is, if we expect that any definite rule can be established one way or the other. It is not altogether surprising that this should be a controversial matter. In cases where a reported statement is of the nature of a spontaneous exclamation or an admission by the party making it, some reliance may naturally be placed upon it. But where the statement directly or indirectly blames another person for causing the injury it must obviously be regarded with the greatest suspicion. The same warning applies to statements by parties in civil proceedings which attribute responsibility to the opposing party. Owing to the technical rules of English law in regard to evidence of statements by deceased persons, the problem is of more practical importance in England than in Scotland. Statements by deceased persons may generally be admitted here, whereas in England they could not be without having recourse to the principle of *res gestae.*

R. v. *Bedingfield*, 14 Cox 341, is often regarded as the leading case on this subject. Evidence of a statement made by a woman who rushed out of a room with her throat cut, and died almost immediately, as to the cause of her injury was rejected on the ground that it was not part of the *res gestae* of the occurrence in the room.

On the other hand, in *R.* v. *Foster*, 6 C. & P. 325, a statement by a man fatally injured in a traffic accident to a person who went up to him immediately after it happened was admitted to show the cause of the accident. An Irish case, *R.* v. *Lunny*, 6 Cox C.C. 477, goes somewhat further. The terms of a statement made by a deceased to the first person he spoke to after he was wounded, at an unspecified time after an attack on him, was admitted to prove the identity of the aggressor.

There seems to be no good reason for supposing that *R.* v. *Bedingfield* was rightly decided and the other two cases wrongly, or, as Baker states (*The Hearsay Rule*, p. 160), that *R.* v. *Foster* has been explained away. Probably *R.* v. *Bedingfield* is commonly followed because it is safer in criminal cases to err on the side of exclusion. All three of the cases were referred to by the House of Lords in *R.* v. *Christie* [1914] A.C. 545, without express disapproval of the decision in each case by the trial judge. It was observed merely that the principle of exclusion had been more strictly applied in *R.* v. *Bedingfield* than in the others. The reason why the House of Lords declined to choose between them is presumably that every case must depend on its particular facts, and they were unwilling in view of the brief reports to decide whether the trial judge exercised his discretion rightly or wrongly. But if an appeal court concluded that serious prejudice has been caused to an accused by the admission of evidence of this kind which ought not to have been admitted, the conviction would no doubt be quashed.

Instead of trying to extract from the welter of cases definite and consistent rules enabling hearsay and original evidence to be distinguished, and in particular making it possible to decide whether a reported statement or utterance can or cannot properly be regarded as within the *res gestae*, it is surely preferable to recognise that the attempt is impracticable. There are no infallible tests, since the notion of *res gestae* is essentially a vague and flexible one. It is always a question of degree and must depend on the whole surrounding circumstances in each case whether the statement shall be admitted. At best there are certain broad principles to be observed, together with some rules of practice which will assist in their observance. These principles and rules of practice may perhaps be summarised, without laying claim to complete accuracy, as follows:

1. Statements made, or words used, by persons other than the witness testifying are generally admissible where it is relevant to show that the statement was made, or the words were used, but not for the purpose of proving other facts in issue. Evidence of the latter kind is inadmissible and incompetent, subject to certain exceptions, such as statements in some cases by deceased persons.

2. A reported statement or utterance is itself a fact which may be proved where, *e.g.*, (a) it is made in the presence of an accused or a party to an action; or (b) amounts to an admission by an accused or a party; or goes to show (c) the maker's state of mind, or (d) intention; or (e) physical sensation; or (f) shows that the evidence of a witness is consistent or inconsistent; or (g) explains a fact in issue; or (h) is so closely associated with a fact in issue that the statement and the fact can reasonably be regarded as a single occurrence.

3. Where it is doubtful whether a reported statement or utterance is itself a relevant fact, or where it is a relevant fact but also tends to prove other facts in issue, and is therefore prima facie both competent as original evidence and at the same time incompetent as hearsay, the whole circumstances must be considered and its evidential value as original evidence weighed against its prejudicial tendency as hearsay before it is admitted.

Authority for proposition (3), which possibly represents the existing law in a rather ideal light, is to be found in *Christie's* case. The House of Lords there decided that evidence of a statement made in the presence of an accused was admissible even though he denied the truth of the statement, but also laid it down that the trial judge should exercise his influence to prevent such evidence being given where it would have little or no evidential value and might seriously prejudice the fairness of the trial. There appears to be every reason why the same principle should apply in other instances where reported statements are prima facie admissible, that is to say where they are from one point of view original evidence, though from another they are hearsay. In the analogous case of evidence of similar facts the House of Lords in *Harris* v. *D. P. P.* [1952] A.C. 694, followed the course adopted previously in *R.* v. *Christie.* It is open to the prosecution, Lord Simon said, to adduce " all proper evidence which tends to prove the charge," and thus it is for the prosecution to decide in the first instance whether evidence of similar facts, or system, should be brought. But it is equally open to the judge to exclude such evidence where he thinks that it should not go before the jury in fairness to the accused. If he does not exclude it, or fails to warn the jury against it, and serious prejudice is suffered by the accused in consequence, then the conviction cannot stand. So, too, the troublesome question of *res gestae* might best be dealt with by leaving it to the prosecution to adduce evidence of a reported statement, where its admissibility is doubtful, subject to the judge's discretion to exclude it.

The Privy Council could have reached the same result in *Teper* v. *R.* as they did on these lines, by deciding that the evidential value of the words heard by the policeman was so small in comparison with their prejudicial effect that they should not have been put before the jury, or at least that the judge should have told the jury to disregard them. It seems a pity that they chose another ground for deciding the case. The prophecy may be made that the opinion of the Board will not be helpful in future cases when it comes to determining whether a reported statement should be admitted or not.

Periodicals also received: *The Western Political Quarterly, The Medico-Legal Journal, The Canadian Bar Review, The International and Comparative Law Quarterly, Revista Jurídica de la Universidad de Puerto Rico, The Law Journal, Italian Affairs, Documentation*

Juridique Étrangère (Brussels), *Revue Internationale de Droit Comparé, La Justicia, Connecticut Bar Journal, Oklahoma Law Review, Jus* (Milan), *New York University Law Review, The American Journal of International Law, The Journal of Transport History, Bandung: Konferencja Krajów Azji i Afryki* 1955, *Textes Législatifs Étrangers* (Brussels), *Revista del Foro, Boletin de la Biblioteca, Revue Progressiste de Droit Français.*

RECENT LITERATURE

The United Kingdom: The Development of its Laws and Constitutions. Scotland by Professor T. B. Smith; The Channel Islands by L. A. Sheridan, LL.B., PH.D. Volume 1 of The British Commonwealth. 1955. London: Stevens & Sons, Ltd. Price £3 3s. net.

The United Kingdom: The Development of its Laws and Constitutions. England and Wales, Northern Ireland, The Isle of Man. Under the General Editorship of G. W. Keeton, M.A., LL.D. and D. Lloyd, M.A., LL.B. Volume 1 of The British Commonwealth. 1955. London: Stevens & Sons, Ltd. Price £3 3s. net.

These two volumes are the first of a new series on the Development of the Laws and Constitutions of The British Commonwealth of Nations. One deals with England and Wales, Northern Ireland, and the Isle of Man; the other, with Scotland and the Channel Islands.

One interesting difference between the two major contributions is that, whereas that on England and Wales is the product of several writers, that on Scotland is the work of a single author, Professor T. B. Smith of Aberdeen.

This fact gives the contribution on Scotland a distinctive unity, all the more notable since the contribution is from the pen of Professor Smith. It is fair to say that Professor Smith has offered his readers, lawyers and laymen alike, something which has no modern parallel in Scotland—a general discussion of the essential principles of Scots law, both historical and comparative; and this is not merely scholarly but also fresh, stimulating, cogent, and marked by a strong individuality. For example, he has made the first general use of the publications of the Stair Society, and the series of modern monographs on Scottish legal history, notably those of the late Lord Cooper, for whose scholarship and insight into new research-techniques he justly displays undisguised admiration. Again, as an Eldon Law Scholar, and an equally distinguished exponent of Scots law, he is unusually well qualified to compare the sister systems north and south of the Border. Add to this a vigorous independence of judgment, and the treatment is always thought-provoking: one may not always accept his conclusions, but one cannot afford to disregard them.

Another distinctive feature of Professor Smith's contribution is that it breaks entirely fresh ground. Nowhere, for example, is there a similar up-to-date general discussion of such matters as the constitutional law of Scotland, Scottish legal education, the distinctive legal status of the Church of Scotland, or (in fields which at present concern especially the legal reformer) the law relating to diminished responsibility, and the vexed question of invitees, licensees, and trespassers.

As Professor Smith is at present engaged in preparing the new edition of Gloag on *Contract* his treatment of Obligations will be read with special interest. No section demonstrates more clearly his critical examination of the authorities, Gloag himself included, whose work, however, he recognises as having "almost institutional authority." Passage after passage from this section might be quoted, but it may be sufficient to instance his closely reasoned discussion of "Void or Voidable," leading to the view that Scottish authority is still inconclusive on the question as to whether error in substantials renders a contract void or only voidable. It is safe to say that counsel, citing *Morrisson* v. *Robertson* and other leading cases on contract to the court, would be well, before doing so, to read what Professor Smith has to say about them.

Among the topics fully discussed is the constitutional significance of the legislative Union of 1707 and the recent decision in *MacCormick* v. *Lord Advocate*, 1953 S.C. 396; 1953 S.L.T. 255. Professor Smith distinguishes between those provisions of the Act of Union which were fundamental, or expressly declared irrevocable, and those provisions which were expressly made variable or about the alteration of which nothing was said. He cites examples of variation by the United Kingdom Parliament of some provisions which fell into the first category and others which did not. "Most treaty relationships," he observes, "require revision from time to time"—as, indeed, international law recognises, in the principle "*rebus sic stantibus.*" The peculiar problem which, however, arises in relation to the legislative Union is that, if Parliament may not effect revision, where can one find a revising body? "Possibly the most clear breach of the Union agreement," he observes, "was the abrogation of the fundamental and essential conditions for University Professors laid down in the Act securing the Protestant Religion." Yet, as he adds, "few would question that repeal was overdue when it came." A treaty condition may constitute a protection, but, in time, it may also come to be a fetter. Professor Smith justifies some of the variations by Parliament of the fundamental legislation of the Union as now "ratified by acquiescence." Other changes, he suggests, might be approved by plebiscite, or by the appointment of fresh Commissioners in equal numbers for England and Scotland to revise the Treaty. But would there be any more legal justification for these methods than for Parliamentary revision itself? It may be thought that, technically, one method is as open to criticism as another, and that the real solution is a common-sense practical one—that revision may be by Parliament, but that revision of any provision conceived in favour of Scotland should take place only when it has the general assent of Scottish representatives. A too intransigent view as to the unalterability of the provisions of the legislative Union might well operate against the interests of Scotland herself.

The contribution on England and Wales will be of particular value to Scots lawyers who desire, in relatively small compass, a general account of the English legal system. The contribution on the Channel Islands contains an interesting account of the process of Clameur de Haro, a fascinating legal antiquity which dates from the Duchy of Normandy and is still in use today. Equally illuminating is the account of the Isle of Man, once affected by the Scottish feudal system, and still within the jurisdiction of the Commissioners of Northern Lights. For those whose practice involves contacts with Northern

Ireland, the short account of the latter's legal system will also provide a useful source for reference.

The two volumes have also the great virtue of being eminently readable, and they are furnished with useful indices. To Professor Smith's contribution there is appended a convenient and up-to-date bibliography of Scots law. J. R. Philip

Baron David Hume's Lectures, 1786–1822. Vol. IV. Edited and annotated by G. Campbell H. Paton, M.A., LL.B., Advocate, Lecturer in the History of Scots Law in the University of Glasgow. 1955. Edinburgh: The Stair Society.

In the years 1939, 1949, 1952 and now in 1955, Baron Hume's lectures on our law as delivered by him when he was Professor of Scots Law in the University of Edinburgh, have been reprinted and published by the Stair Society. Volume IV, which now makes its appearance, is by far the most formidable for sheer length, and its appearance constitutes an addition of first-class importance to the corpus of material now being made available to students of the history of our law by the enlightened policy of the Stair Society.

The subject-matter, stated very briefly, is pledge and hypothec, leases, feudal law of land-ownership involving the conveyance of rights, liferent rights, securities over land, adjudication and prescription. The inclusion of these matters in Hume's lectures helps to explain how the holder of his chair contrived to instruct the young at such length. He was in effect doing the work of two modern professors—at least.

A conventional review of the contents of this volume would appear to be otiose if not impertinent. The field covered is too wide, and criticism without prolonged study neither useful nor seemly. There is, however, one comment which the present writer will permit himself. The feudal law of land rights is not, to everybody, an easy or an endearing subject. When, however, it is presented in lecture form, with the underlying thought introduced and, as it were, humanised by such expressions as " In this place we are naturally led to inquire . . ." or " As you will readily believe . . ." it is probably rendered as easy of acceptance as is possible. And that is the style of this treatise.

The editor of this, as of the preceding volumes, is Mr. Campbell Paton and it would be difficult to praise his work too highly. The exigencies of modern book production have led to the reduction of his valuable notes to a " bare minimum " in this volume, as he himself points out. And while sympathising with the reason for this we must surely regret what must thereby be lost to the student. However that may be, Mr. Paton has added another course to the massive edifice of scholarship which he has produced in editing Hume's Lectures. Earlier reviews have praised his " careful and painstaking scholarship " and the present writer can think of no better appreciation of his work. The quality of his work has been of the first class and the industry requisite to cope with the work is a possession not often encountered. His contribution to the history of Scots law is already invaluable. A. D. Gibb

Miscellany-at-Law. By R. E. Megarry, Barrister-at-Law. 1955. London: Stevens & Sons, Ltd. 25s. net.

The author has chosen as a subtitle for this book " a diversion for lawyers and others." And there can be no doubt that throughout its 365 pages it contrives to be extremely diverting. But there is much more to it than that. For whatever the subjects of these twenty-five chapters, the reader will find a good deal of law treated with seriousness and decorum, although this treatment is in some cases partially concealed by the droll nomenclature of the chapters. The most wide-ranging legal mind, for example, could attach but little meaning to such titles as "*A Resounding Slap*," "*The Flushed Moorcock*," or "*Blowing Hotter*," although "*The Chancellor's Foot*" and "*A Horse High and Unruly*" are easier.

On pages 304–332 an extremely lively and interesting discussion on *stare decisis* will be found under the curious title of "*The Trail of the Calf.*" And under the title of "*These Scambling Reports*" are collected some highly ludicrous examples of entitlement of cases from which we may perhaps be permitted to excerpt such treasures as "*The King* v. *49 Casks of Brandy*," "*U.S.* v. *15 Drilled Diamonds*" and "*Re Visser, H.M. the Queen of Holland* (*Married Woman*) v. *Drukker and Others.*" Here the learned author might with advantage have explained some titles of cases in the English courts, which, whilst of more ordinary occurrence, are sufficiently puzzling to the Scots lawyer. In this chapter, too, Mr. Megarry gives some examples of Law French which attain to a high degree of absurdity. He quotes, for example, what he calls a celebrated specimen of Law French as follows: " Si j'ay un popingay ou thrush, que chant et refraische mes esprits, ceo est grand confort a moi." There is indeed something to be learned from every page of this unusual work. To take some points at random, we can read of "the strangest case ever decided"; Maitland's observations on the Scottish Church case; an English layman's view of what constitutes adultery ("I thought it meant drinking with men in public houses"); why Sir Samuel Shepherd refused an English and accepted a Scottish judgeship; how King James VI was snubbed by the Court of Session; how many eminent lawyers made a mess of their own wills; what is meant by a "carted jury" and the plea of *nolo contendere*; of the judge who was provoked into exclaiming "My God!" on the Bench. There are also many excellent stories, even if that well-known raconteur Ben Trovato is at times heavily drawn upon.

A reading of the book leaves one surprised at the frequency with which judges have adopted an ironical tone in giving their judgments. There are countless examples in the text from which we take only that of Mr. Justice Astbury, who is reported as saying on one occasion that "This interesting question is considerably complicated by the simplification introduced by the new property legislation."

Rather surprisingly, the Scottish courts and judges, to say nothing of the law of Scotland, are more referred to than their Irish counterparts. Mr. Megarry is less unfamiliar with Scottish matters than so many of his countrymen, and his attitude is gratifyingly sympathetic. Indeed, his knowledge extends to the Sheriff Court Reports, whence he excerpts part of the judgment of Sheriff Hector McKechnie in the case of the gate-crashing cow in Inverness. In dealing with the House of Lords, he says, " Perhaps those Scots who grumble at the subjugation of their Court of Session to a predominantly English House of Lords might occasionally reflect on the puissance of a minority party which holds the balance of power." This familiar counter to Scottish criticism will, however, deceive nobody. It is perhaps with some little distaste that we read the description by Lord Maugham of Scots law as " Those interesting relics of barbarism tempered by a few importations from Rome "; the more so that on the ensuing page reference is made to one of the many lessons which have had to be taught the English lawyer by practitioners of that same barbarous system. This is Lord Redesdale *redivivus*.

Altogether a most unusual if not actually innominate book, which will enhance the author's high reputation in other fields and will convey not a little learning along with excellent entertainment.

A. D. Gibb

A Common Lawyer looks at the Civil Law. By F. H. Lawson. (xvii and 238 pp.) 1955. Ann Arbor. University of Michigan Law School.

This book comprises the Thomas M. Cooley Lectures delivered in the University of Michigan Law School in 1953 by the Professor of Comparative Law at Oxford. The object and theme of the work may best be stated in the author's own words. Having expressed his view that, to make Roman law a subject completely alive for the student in the modern common law world, what is needed is " a course which will show the debt of the modern world to Roman law by using it as a vehicle for teaching modern civil law," he goes on, " I cannot hope to give such a course on this occasion; but I shall try to show in a very superficial way what can be done in that direction by giving you a brief anatomy of the civil law, as it appears to a comparative lawyer who, though long accustomed to teach Roman law, still looks at law mainly as a common lawyer " (pp. 1–2). Having said this, the learned author then proceeds to give the lie to that " very superficial way " and to his depreciatory self-appraisal in five chapters which, full of erudition and interest, range easily down the centuries to Rome and back, and across the legal systems of the world.

It is, of course, basically the legal systems of Continental Europe (and, where relevant, their derivatives) with which Professor Lawson is concerned—those systems which, for all the existence of local bodies of customary rules that have influenced especially their family and succession provisions, had for centuries a solid bond of unity in the Roman law transmitted in the *Corpus Juris* and through the commentators from the Glossators to the Pandectists; a bond which has left a spiritual unity despite the modern proliferation of national codes. The lectures give a picture of their history and sources (Chapters 1 and 2), the contribution of Roman law to their content (Chapter 3) and the development of that contribution by, especially, the natural lawyers of the " Age of Reason " (Chapter 4) and they conclude with a consideration of non-Roman elements in the civil law systems (Chapter V).

Those who have enjoyed the author's Hamlyn Lectures, "The Rational Strength of English Law," will be already aware of Professor Lawson's mastery of this medium—the racy style, the talent ("flair" is too trivial a word) for the simple and lucid statement of the substance of the law, combined with a brilliance of generalisation in commentary and a "gift of illuminating a dark problem by a quick and penetrating observation." All are demonstrated again in the present work.

Take for example the sketch of Roman law which is the heart of the book, addressed to an American audience whose acquaintance with Roman law may be presumed to be even slighter than that of the average legal public in these islands. The need to give a general account of the law—which is excellently done in remarkably small compass—does not prevent the author from developing, at relative length yet without any impression of unbalance, his views on the consensual contracts, which he finds important as a manifestation of the practical approach and analysis of the lawyers of Rome. The characteristic of Roman law as a law of movement, of change (the law of property, for instance, is essentially a law of conveyancing) is linked with the relative mediocrity of its law of delict, for delict principally concerns the disturbance of settled positions. ("The Digest title on theft (47.2) is notoriously a mess, which cannot be completely attributed to the blundering haste of the compilers," p. 101, n. 16.) Again, there is the notice of the "symmetry of dissonance" between the common law and Roman law: they both abound in concepts—but in different places: the common law of real property is the real counterpart of the richness of the Roman law of contract; the relative poverty of the Roman law of property is matched in the common law of contract. And these differences have passed into and based the variance between the common law and modern civil systems.

For Professor Lawson maintains (Chapter 2) that it is essentially a difference of substance and not of method which really lies between the two; and he deals several doughty blows at the popular conception that codification and deductive reasoning are the distinctive criteria of the civil systems. There are common law codes and in most cases the work of the common law judge of modern times is the application of general principles to particular cases. Codification is usually the product of practical reasons, *e.g.*, the plethora of existing legal material, triumphant nationalism, etc. The greater influence of juristic thought and institutional writing in the civil law, with its resultant conceptualism and its greater predominance of law over fact, stems from the fact that, in the *Corpus Juris*, the civilians were taking over a developed legal system—often providing answers to questions which, for them, had not yet arisen—from which they could refine, elaborate and generalise; whereas the common lawyer was perpetually building up and adding to his material from the actual circumstances of litigation. Certainly (as is demonstrated in Chapter 4) the methodological differences affected developments in the civil law—*e.g.*, the rationalisation which resulted in the general concept of the *Rechtsgeschäft*—but at base it is the difference of content which is the real ground of cleavage between the civil law and the common law.

Lest it be thought from what precedes that Scotland is ignored, the reviewer hastens to say that, on the contrary, the author is very conscious of the system across the Border from his own country. The influence of the pre-(French) revolutionary civil law on Scots law recurs through the book: Stair takes his rightful place in the august company of Grotius and Domat; and what of the interesting question —" Did the existence of a divided profession and a bench recruited from the bar make Scots law less civilian than continental law even before it became drawn into the English orbit by close commercial relations and the appeal to the House of Lords? " (p. 86.)

But really one could go on culling good things from the book. One does not always agree with the author but disagreement is on points of comparative detail which do not prevent one's stimulation by the author's views. Professor Lawson set out to give an introduction to the civil law and that he does most handsomely.

The work is completed by a foreword by Professor Hessel E. Yntema of Michigan and a Select Bibliography on Comparative, Roman, French, German, Scots and Roman-Dutch laws—one might regret the absence of reference to Italian law. The University of Michigan has produced the book most attractively and errors are few —on p. 22, 1.14, " his " should read " this "; at p. 159, n. 27 " *Ibid.*, 225 " has no meaning as no work of the author in question (Bonfante) has been cited previously; and in the index, Stair is given a non-existent reference on p. 49. J. A. C. Thomas

The Proof of Guilt: a study of the English Criminal Trial. By Glanville Williams, LL.D., Fellow of Jesus College, Cambridge, and Barrister-at-Law. 1955. London: Stevens & Sons, Ltd. 17s. 6d. net.

This is, in book form, the seventh series of lectures given under the auspices of the Hamlyn Trust. It is scarcely conceivable that the contents of the book could have been conveyed to an audience in the course of four lectures, as the preface states, but this is no blemish and there is no superfluity in any of the 294 pages in which the learned author has expounded his themes.

The work consists of a description of salient features of the English criminal trial, and the method chosen rightly involves a good deal of comparison. Beginning with the evolution of the English trial, the author discusses such matters as the position of the judge, the examination of witnesses, the system of evidence, the meaning of the burden of proof, and separate and joint trials.

Dr. Williams's attitude towards many questions which he raises under these and other headings is wholly different from that of certain English lawyers who, confident of the pre-eminence of their own legal system, can recognise no faults in it. Whilst conscious of its merits, he is at the same time alive to many faults which strike the outsider and, indeed, to a number of faults which may not so readily have occurred to the outsider. His observations throughout the book upon the French trial are of particular interest, and they throw light on many points which must have puzzled lawyers on this side of the Channel. At p. 71, for example, he tells us that in France a witness is allowed to recite or wrangle without interruption, and that the French think that for a witness the principal quality is spontaneity, drily adding " whether they get spontaneity is another matter."

The various chapters are full of matter which is not only interesting but which may be useful to the practitioner. He tells us, for example, that juries tend to regard handwriting evidence and fingerprint evidence with equal distrust, and goes on to show how that distrust is not merited in one case, although extremely well merited in the other. Dr. Williams has a refreshingly independent approach to the question of the burden of proof, and quotes respectable authority for the proposition that the acquittal of guilty persons is a matter which should cause concern, however lightly it may be regarded by those whose sentimentalism is harnessed always to the cause of the accused person. He deals at some length with the outstanding cases of wrongful conviction and makes it clear that both in *Beck's* case and the case of *Slater* closer adherence to the rules might have served to prevent the unhappy results.

Chapter 10, however, of this book, by far the longest, is really the *pièce de résistance.* Nowhere does Dr. Williams show his independence of thought so clearly as in the discussion of the jury system. Quoting impartially from supporters and opponents alike, he does not conceal his own highly critical attitude towards this institution, and under the scalpel of his probing the most grandiloquent encomiums upon the jury system begin to look extreme and far fetched. The views of many distinguished lawyers, such as Russell, Hewart, Sterndale, Stephen, Halsbury, and the present Lord Chief Justice, Lord Goddard, come under review, and their views, not always consistent, are quoted. Perhaps justice would be done to the learned author's own view by the words of Lord Goddard, who said in the House of Lords on a recent occasion that he had often wondered whether the lip-service paid " to the great palladium of British justice, the jury " was well justified.

It is sometimes noticeable in works such as this that the matter which seems to a Scots lawyer to lie most conveniently at hand for comparison with the English system, namely the law of Scotland, is completely ignored. That cannot be said of this work, and from time to time there is mention of our different ways north of the Border, as, for example, where the view is expressed that decision by a majority of a jury of fifteen would not find favour in England, despite the inconvenience which the insistence upon unanimity causes.

If a new edition of this book is called for it might be of interest to consider in the first chapter whether the system of private prosecution still persisting in England is really a system which ought fairly to survive in modern times, contrary to the example of most countries living under our Western civilization. Strangely, however, this is a feature of the criminal law of England which never appears to evoke disapproval, even in such an enlightened work as that under review. One small point of criticism: a book of so much interest and value deserves the addition of an index.

A. D. Gibb

The Law of Bankers' Commercial Credits. By the late H. C. Gutteridge, LL.D., Q.C., and Maurice Megrah. 1955. London: Europa Publications, Ltd. 227 pp. 25s. net.

This is the second edition of a work first published in 1932. The revision, amplification and re-editing of the work has been undertaken by Mr. Maurice Megrah, who is secretary of the Institute of Bankers in London and pre-eminently qualified to undertake the task.

Until the beginning of this century the financing of the movement of goods by means of bills of exchange was practically the exclusive privilege of the merchant banking houses in the city of London. Since that time, however, the commercial banks in this country have taken an ever increasing share in this type of business until the obligations of the Scottish banks alone under the heading of acceptances, endorsements, etc., on behalf of customers amount to over £42m.

In modern times the method of financing such transactions is not by bills of exchange but by bankers' commercial credits, whereby the bankers acting on behalf of the buyers assume liability for the price of the goods.

To those called upon to advise the banks in such matters this book must prove itself invaluable, as it is the only treatise on the subject and, as Mr. Megrah says in his preface, it is not so much the law as the practice relating to documentary credits which has changed in the last twenty years.

The work adequately covers all aspects of the subject: the contractual relationship of the parties; the nature of the documents required, and the right of the various parties, especially those of the banker, over the goods which form the *raison d'être* of the contract.

In a very useful series of appendices there are given not only a glossary of terms and definitions and a full set of specimen forms and examples but also the full terms of the " Uniform customs and practice for commercial documentary credits." J. H. Lockie

The Elements of Roman Law. Fourth edition. By R. W. Lee. xxviii and 499 pp. 1956. London: Sweet & Maxwell, Ltd. 30s. net.

That a fourth edition of an English textbook on Roman law should be required within twelve years of its first appearance is eloquent testimony of the solid merits of the work, which are now well known to the English-speaking world. If the following comments be in the main critical, it must be emphasised that this is so because the virtues of the book need no commendation.

How does this edition differ from its predecessors? The author tells us that, the book having been completely reset, he has had greater liberty to alter his text than in previous editions but that he has exercised his freedom with restraint. This is a just appraisal. For, while, for instance, the *Actio Publiciana* now finds its natural habitat in the discussion of *usucapio* and an improved distinction between " formal " and " causal " contracts is to be found at pp. 286–287, the opportunity has not been taken to act upon other suggestions made in respect of earlier editions—for example, bonitary ownership still awaits and merits a fuller treatment, as also the general theory of universal succession; the ambiguity in the use of the word " causal " remains in § 412, while p. 9 still suggests that the development of the law by fictions was confined to a period of a century or so after the Twelve Tables. On the whole, both the general character and the content of the book remain unchanged.

An innovation is that Professor Lee has endeavoured in this edition to distinguish between what is essential and what is less essential for the student to read. This, it is thought, is not successful for both substantive and mechanical reasons. In the first place, as the author recognises, the line is bound to be arbitrarily drawn—this disarms in advance the critic who else might wonder why *inter alia* tutelary remedies (pp. 90–91), juristic persons (§ 142), the *Actio Publiciana* (pp. 123–124), plurality of creditors (pp. 408 *et seq.*) and *venditio bonorum* (pp. 455 *et seq.*) come into the category of the less essential but not the succession of gentiles on intestacy (p. 258). More broadly, though, "Lee" has never been—if one omit the excellent translation of the Institutes—a bulky book; and, as already indicated, there are important topics such as bonitary ownership which receive slight treatment as it is. Some expansion might therefore have been hoped for, rather than an attempt at further reduction of necessary reading within the present text. On the mechanical side, it is suggested that if, nevertheless, such an attempted selection is to be made, it should be clearly done. In the present book, there is no difference of type between the "essential" and the "non-essential" but the latter pages are more closely packed by reducing spacing between lines. The result is that, when one comes upon these pages, one thinks rather of printer's aberrations than of author's policy; the use of a smaller type—*e.g.*, that used for the translations or the useful appendices on modern law—would have been far more desirable.

Some misprints and orthographical errors were noted. The more important are the following:—the *constitutio Antoniniana* becomes *Antoniana* (p. 56, n. 62); the *quarta* should be *Antonina* (p. 71, line 29); on p. 384, n. 68 refers to Jolowicz, *De Furtis* but n. 69 to the same author's Historical Introduction to Roman Law; the action on p. 445 (§ 733 (d)) should be *ex vendito*; in the Index (p. 493), *altius tollendi* should appear under *Jus* (= right) and not under *Jus* (= law).

J. A. C. THOMAS

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

The Road to Justice. By The Rt. Hon. Sir Alfred Denning. 1955. London: Stevens & Sons, Ltd. Price 10s. 6d. net.

The Elements of Income Tax Law. By C. N. Beattie, LL.B. Second Edition—Supplement to July 31, 1955 by J. R. B. Price, LL.B. 1955. London: Stevens & Sons, Ltd. Price 2s. 6d. net.

Studies in Muslim Law. Volume 1 (Batil and Fasid Marriages). By Dr. N. U. A. Siddiqui, M.A., B.C.L.(Oxon), LL.D. (Trinity College, Dublin). 1955. Dacca: Iqbal Uddin Ahmad. Price Rs. 15 only.

JURIDICAL REVIEW

LAW AND OPINION IN BRITAIN SINCE 1900 *

ANY survey of the relation in recent times between the progress of law and the course of public opinion in Britain almost inevitably starts from the masterly and illuminating book [1] in which A. V. Dicey surveyed those relations in England during the nineteenth century. This work consisted of the published version of the course of lectures which he had given on that theme, first at the Harvard Law School in 1898, and subsequently at Oxford. Dicey himself described the study [2] as " an attempt to follow out the connection or relation between a century of English legislation and successive currents of opinion . . ., in fact an endeavour to bring the growth of English laws during a hundred years into connection with the course of English thought." In it he showed how Benthamite liberalism built up the machinery of legislation to remove archaisms and inequalities of the older law and thereby created the principal instrument of modern social reform.

Nine years later, on the eve of the First World War, he prefixed to the second edition a long new introduction surveying the trends which had already become apparent to him in the opening years of the new century, in truth an epilogue to the original work. Now that the twentieth century has more than half run its course, it may be profitable to examine the question again for this later period and again try to " study the development of modern law in connection

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* Essay awarded the Blackwell Prize in the University of Aberdeen, 1955.

[1] *Lectures on the Relation between Law and Public Opinion in England during the nineteenth century*, by A. V. Dicey, K.C., Vinerian Professor of English Law: first edition, 1905; second edition, 1914.

[2] 1st ed., pref. viii.

with the course of modern thought, and to realise that dry legal rules have a new interest and meaning when connected with the varying current of public opinion,"[3] for it is notorious that the half-century has produced enormous changes, not least in social structure, and has profoundly changed the structure and functions of legal institutions.

The two conceptions of law and public opinion do not fall to be considered as radically different, still less as opposed phenomena. In modern analyses of society, both are considered as agencies of social control, that is, as influences which materially affect and regulate the activities of the individuals and the groups living within an organised political society.[4] In this they resemble other similar social controls such as morals, religion, and fashion or convention. But law is much the most important and most far-reaching of all these agencies of control: it alone is the agency utilised by the supreme political authority as a means of regulation: it alone is sanctioned and enforced by, if necessary, the whole force of the State: it alone can, and today frequently does, regulate the utmost minutiae of man's every activity, overruling in the process the weaker injunctions and prohibitions of any or all of the other agencies of social control. None of these controls can be ignored wholly with impunity, but the sanctions for defiance of the law are immensely stronger than the disapproval, ridicule, or ostracism which promote compliance with other controls. Today more than ever before law is an influence affecting practically every aspect of individual and group conduct. While in modern times the influence of morals and religion has diminished and that of fashion or convention probably diminished rather than increased as compared with the nineteenth century, that of public opinion is greater than ever owing to the modern methods of communicating ideas and influencing opinions such as the film, radio, television, widespread advertising, and the extension of the electorate.

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[3] *Op. cit.* pref. ix.

[4] *Cf.* Pound: *Social Control Through Law*; MacIver and Page: *Society.*

Discussion of the nature of law is out of place here but it may for present purposes be taken to be the whole body of rules enforceable by judicial and administrative tribunals. To a steadily increasing extent the rules or norms of conduct take the form of categorical injunctions or prohibitions emanating from the supreme political authority. Opinion on the other hand is a nebulous thing and indefinite as compared with law, the state of which can at any time be ascertained with reasonable certainty. But opinion is vague and changeable, liable to be swayed by extraneous circumstances and to fluctuate almost unaccountably. Moreover " the public opinion which finds expression in legislation is a very complex phenomenon, and often takes the form of a compromise resulting from a conflict between the ideas of the government and the feelings or habits of the governed." [5]

When dealing with the relations of law and public opinion it is necessary to distinguish between the general public opinion of the country and that of a particular group such as the legal profession. This last is influential, more particularly in matters of private law, quite out of proportion to its size in the community. The vital difference is that it is adequately informed and fully cognisant of the technical issues involved. General public opinion may say that " There should be a law about that " or that some particular rule of law is unfair. Professional opinion appreciates the difficulties or sometimes the impossibility of effecting the change, or conversely, it desiderates some change for which the general public opinion has evinced no demand. Important issues of private, and many of public, law are not matters which figure largely in the daily news or conversation, but may provoke controversy in the legal periodicals though remaining unknown to the public. The expert opinion is, however, known to at least some of the legislators, to the judiciary, and to the Law Reform Committee, and may therefore have a substantial influence on legislation and judicial decision.

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[5] Dicey, *op. cit.* 10.

But this essay is concerned more particularly with the general public opinion. What is understood by general public opinion? "There exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion."[6] Again it might be said to be "That great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs which is called public opinion."[7] "The term when used in reference to legislation is merely a short way of describing the belief or conviction prevalent in a given society that particular laws are beneficial, and therefore ought to be maintained, and that they are harmful, and therefore ought to be modified or repealed, and the assertion that public opinion governs legislation in a particular country means that laws are there maintained or repealed in accordance with the opinion or wishes of its inhabitants."[8] "The term is commonly used to denote the aggregate of the views men hold regarding matters that affect or interest the community. Thus understood, it is a congeries of all sorts of discrepant notions, beliefs, fancies, prejudices, aspirations. It is confused, incoherent, amorphous, varying from day to day and week to week. But in the midst of this diversity and confusion every question as it rises into importance is subjected to a process of consolidation and clarification until there emerge and take definite shape certain views or sets of interconnected views, each held and advocated in common by bodies of citizens. It is to the power exerted by any such view or set of views, when held by an apparent majority of citizens, that we refer when we talk of Public Opinion as approving or disapproving a certain doctrine or proposal, and thereby becoming a guiding or ruling power. Or we may think of the opinion of a whole nation as made up of different currents of sentiment, each embodying or supporting a view or a doctrine or a practical proposal. Some currents develop more strength than others, because they have behind them larger numbers or more intensity of conviction; and when one is evidently the strongest, it begins to be called Public Opinion *par excellence*, being then taken to embody the views supposed to be held by the bulk of the people. . . . Till there is a voting, its power, being open to doubt, has no legal claim to obedience. But impalpable though it may be, no sensible man disputes that power, and such governing authorities as ministries and legislatures are obliged to take account of it and shape their course accordingly." [9]

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[6] Dicey, 2nd ed., 19–20.

[7] Peel, quoted in Dicey, *op. cit.*, 20, f.n.

[8] Dicey, *op. cit.*, 3.

There may, however, be several publics. "There may be at different times and with different degrees of interest, a political public, a financial public, and a public concerned with art, moral reform or any other topic of relatively widespread general interest. . . . A public [is] a loosely-knit association of persons who are interested to the extent of having opinions on some general topic of attention. . . . An opinion is a belief somewhat stronger or more intense than a mere notion or impression but less strong than positive knowledge based on complete or adequate proof. Opinions are really beliefs about a controversial topic or with respect to the relative interpretation or moral meaning of certain facts. Public opinion consists of the opinions held by a public at a certain time." [10]

While then in relation to law it may be possible to distinguish public opinion into many kinds and degrees, these necessarily tend to run into one another. Classification of individuals by sex or age or social or economic status may yield groups holding similar opinions but every such group has its exceptions. Classification by political creed is more reliable but there again there are Labour peers and Tory workmen, not all women want " equal pay for equal work," nor do all well-to-do deplore high taxation. A more satisfactory distinction arises with regard to the legislation in issue. " At one end of the scale there are subjects of so technical a character—such as a change in conveyancing law—that . . . there is really no general opinion about them except among a very limited class. At the other end of the scale there are questions of such immediate import to every individual—such as national defence or survival—that it is possible to discern an overwhelming majority of general sentiment. In between these two extremes there is a vast number of day-to-day concerns less obviously vital to individual and collective existence, but of importance to different sections of the community. Thus in innumerable matters in the modern State public opinion is not one but many." [11]

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[9] Bryce, *Modern Democracies*, I, 173.

[10] Young, *Manual of Social Psychology*, 430–431.

The influence of the general opinion of a limited class is frequently, however, of profound importance in influencing the character and process of law-making in matters affecting that class. Measures of considerable range and importance are seldom today introduced without a great deal of preparation, research and negotiation of which the public and probably many members of Parliament are practically unaware. Expert and representative interests are consulted and information collected over a long period, and a measure may pass from one administration to another over a lengthy period before it is finally in shape for debate and enactment. Further, the necessity for sharing limited Parliamentary time between Departments all of whom have several measures they are desirous of putting through further demands that before policy issues in a Bill it should have been thoroughly threshed out.[12]

One valuable consequence of this system is that it gives more weight and value to the views of those who have knowledge and experience and who will be most deeply affected by the proposed legislation. In voting at an election and equally in a Division in the House every vote has the same effective value. The vote of a man with conscience, knowledge, experience and judgment counts for no more than that of the most ignorant and foolish. The possible dangers from legislation resulting from a majority of votes, possibly of the more foolish or partisan, is greatly mitigated if the measure in question has been approved in principle by the interests affected.

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[11] Allen, *Law in the Making*, 5th ed., 411.
[12] *Ibid.*, 411–412.

It is symptomatic of the strong connection between public opinion and political opinion that the topics of law on which general public opinion is most vocal are generally those of public law. Questions of private law, apart from divorce, rouse little or no public interest. They are generally unknown: even measures which profoundly affected the rights and liberties of individuals have passed into law without significant public demand or expression of satisfaction, such as the Crown Proceedings Act, 1947. It is still harder to believe that general public opinion had any strong views on the property legislation of 1925 or the changes in contributory negligence in 1945. Again Scottish lawyers generally believe that the Scottish law of intestate succession is badly in need of statutory revision: but the Mackintosh Committee, which examined the question and accepted this view and proposed drastic changes, had to observe in their report [13] that there was no public demand for change. It is otherwise, however, on matters of public law. The progress of the nationalisation programme in 1945–1950 was carefully watched in the country and gave rise to heated controversy. The criminal law, at least as to punishment (and it always, if only from its morbid side, has a public) has also been much in the limelight in recent years and agitation for the removal of the death penalty has commanded considerable support. It follows that consideration of the general public opinion will result in a concentration of attention on matters of public rather than of private law.

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[13] Cmd. 8144 of 1951.

The Expression of Public Opinion

Public opinion may receive overt expression in the form of violence by way of riots, demonstrations, protest meetings, strikes or even open warfare. In the half-century under consideration these methods have not been prominent and have diminished as compared with earlier years: there have been no parallels to the Chartists and Peterloo. But they have not been entirely absent: examples are the activities of the suffragettes in favour of women's suffrage in 1910–1914, the Irish rebellion of 1916, the clashes between Fascists and Jews in London in 1935–1936 and the destruction of symbols bearing the Royal Cypher in Scotland in 1953 in protest against the numeral attaching to the title. The historians also record great exacerbation of political tempers in 1910–1913. Yet other manifestations of opinion of this kind, *e.g.*, hunger-marches during the depression of the 1930's, were notably orderly. It is, however, significant that in such cases the underlying philosophy was an expectation that the Government should assume responsibility for the economic situation and take steps to relieve it. A century ago few would have thought to hold the Government responsible for an economic crisis.

In this century straw-votes and popular polls have become significant devices for recording shifts in popular opinion, originating largely from the practice of canvassing potential voters with a view to foretelling the results of an election. Thus Gallup polls, interviews of sample individuals, and mass-observation are all species of this and the experts profess thereby to ascertain the trend of public opinion at any given time on particular questions. Their forecasts are sometimes, however, hopelessly wrong. So too the drift of public opinion may be ascertained to some extent from the press though this an unsafe guide: nor are popular meetings a sure index. Moreover none of these expressions of public opinion have any direct influence on law either by legislation or legal decision.

By far the most important means of expressing public opinion, and moreover one which may and does significantly affect law, is voting at Parliamentary elections. Moreover, this means of expression has developed greatly since 1900. In the absence of proportional representation it cannot be said that the House of Commons has reflected with mathematical accuracy the public opinion of the day, or even of election day, but it may be taken to reflect far more than in the nineteenth century in a broad and general way the general public opinion of the country on the issues at stake in the election. That opinion was sharply expressed in the two General Elections of 1910, and again in 1945. The action of opinion is, however, continuous while that of voting is occasional, and a large part of the votes are cast with little reference and little appreciation of the main issues involved. "Yet in the intervals between elections it imposes some check on the vehemence of party spirit and the recklessness or want of scruple of party leaders, and it restrains the disposition of party government to abuse its power. When a ministry or legislature feels the tide of opinion beginning to run against some of their purposes they pause. Many a plan has been abandoned without any formal declaration of popular disapproval because disapproval was felt to be in the air. This is not to say that the current of opinion for the time being dominant is always right. . . . The people may err, in whatever way its will be expressed, but error is more probable at moments, such as elections when the passion of strife is hottest."[14]

In pure theory then election of the legislature by adult suffrage results in a legislative body whose composition completely and accurately represents the prevailing trend of public opinion, and consequently will result in legislation prompted by and according with the trend of that opinion. To some extent it actually does this. To that extent it is more than ever true now that "the opinion of the governed is the real foundation of all government."[15] A government which antagonises the larger part of opinion will lose the next election. It is, however, rather a matter of psychology to say how far the opinion voting a particular government into power is truly based on weighing the issues at stake and balancing the measures proposed by the contending parties and how far it is based on personal and class interests. "In legislation men are guided in the main by their real or apparent interests."[16] In particular a large part of the appeal of the Labour Party to the working classes lies in the continuing promise of a system of government which will give those classes material and financial benefits at the expense of other classes.

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[14] Bryce, *Modern Democracies*, I, 176–177.

On the other hand once a government takes office it is largely independent of public opinion. The House of Commons has come since 1900 to be largely a body of paid professional politicians, merely a machine for putting into effect the policy of the group who are the leaders of the Parliamentary party and form the Cabinet when their party is in power. Their followers are a disciplined and generally obedient body of voters who must support the party line very largely irrespective of their personal convictions. Back-bench revolts usually collapse. They are less men than numbers in the House and are voted for or against very largely as the party-representative rather than for their personal qualities. The independent member has completely disappeared. Furthermore since 1900 there has been a most significant growth of the power of the Executive to almost despotic heights, a trend hastened by the two World Wars during both of which Parliament extended its own life. While in power it cannot be compelled by public opinion to implement all or any of its programme, and as time goes on it becomes increasingly distant from public opinion and unresponsive thereto. It is not bound to pay any heed to opinion in the country though as another election approaches it tends to do so and for that reason it must seek to persuade public opinion to move with it. So it has been said that public opinion controls the Government through the House of Commons, but the Government by its majority controls the House of Commons.

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[15] Dicey, *op. cit.*, 3.
[16] Dicey, *op. cit.*, 12.

It is perfectly possible therefore for a government by using its majority to impose on the country a course of legislation with scant regard for public opinion or the beliefs of minorities. This danger is particularly apparent when debate on long and complicated measures is abridged by the guillotine and it is only mildly tempered by the fact that after, at most, five years that government must submit itself to the votes of the community, a body which includes all shades of opinion which have been antagonised severally by some measure or another (and every measure tends to antagonise some group). But there are occasional direct and vehement expressions of public opinion. It may flare up suddenly over some incident, indiscretion, injustice or scandal which gains notoriety in the press and touches excitable susceptibilities. Sometimes public opinion is reflected in the vague " feeling of the House." Sometimes a judicial decision concentrates attention upon a grave anomaly of the law, and a demand for immediate reform proves irresistible. These are the more obvious manifestations, though for the most part in the modern State the forces of public opinion or of sections of public opinion are more subtle and less discernible than these loud and distinct demands, but make themselves felt through many and devious channels.

Thus there have been numerous instances in this century where a general sentiment of opinion was manifested both inside and outside the House and had some effect on the course of legislation and administration. Thus the Incitement to Disaffection Bill, 1934, was passed, despite a large Government majority, only with amendments, in consequence of propaganda, meetings, articles and a great general outcry. " The Bill as passed was very different from the

Bill as presented; and public opinion had amended it."[17] In the same year criticism in the House caused the Government to withdraw the Unemployment Assistance Regulations. In 1935 the Hoare-Laval proposals for settling the Italo-Ethiopian dispute provoked a spontaneous outburst of protest throughout the country, which resulted in the Cabinet reconsidering its views, the resignation of the Minister responsible, and the lapse of the proposals, killed by public opinion. In the following two years the Government had to withdraw the Coal Mines Bill (1936) and the National Defence Contribution (1937) and radically to amend the Population Bill (1937). In 1940 Mr. Chamberlain resigned, though he had a majority in the House, when he saw that the tide of opinion was running against him. In 1953 the proposal to raise the salaries of the judiciary by a tax-free increase met with such a bad reception in the House and in the press that it was altered to a larger but taxable increase, while in 1954 an outcry about the misuse of compulsory powers—the Crichel Down affair—caused the resignation of the Minister.

In the same way the dependence of the Government on public opinion, both in general and that of particular interests affected, is constantly recognised. Speeches in debate are concerned largely to persuade public opinion: public speeches and party political broadcasts are designed to the same end. The Opposition is constantly appealing to public opinion, and striving by its criticism to relate Government policy to its interpretation of public opinion. Much legislation too is derived from the opinion of organised interests, and amended in its progress on the representations of such interests, or opposed by what is in truth the opposition of interests. Matters of really general concern are comparatively few, but the interests concerned in a particular measure are more directly affected and more vocal, and countless organisations and societies represent and press their views on members, the Departments, Royal

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[17] Jennings, *Cabinet Government*, 443.

Commissions and Departmental Committees and on the press and public generally. Commissions and Committees usually contain a proportion of members with knowledge of the interests involved, partly because they are the experts outside the Civil Service, and partly because generally the legislation cannot effectively be carried out without the collaboration of these interests. Moreover while the Government initiates most legislation, it wants an Act once passed to take effect with the least possible delay and controversy. In addition, if a Bill receives the expert criticism of those who know something about the subject it is certain to operate better and to require less amendment. For these reasons, it is the practice, whenever new provisions have to be made, to consult the appropriate outside interests, in effect the section of public opinion affected. It is not usual to submit the terms of a proposed Bill but only the principles of the proposals, or to invite criticism of a notified scheme. The purpose is to attempt to reach agreement before the Bill is introduced, and to reduce opposition and delay in passing it through the House.

A recent example of concerted action to represent at least a section of public opinion to the Government occurred in 1954 when the campaign for equal pay for women resulted in twenty-five Parliamentary questions to the Chancellor of the Exchequer being put down on the same day, two large petitions being presented, mass meetings and the presentation of a Bill under the 10-minute rule. Even the Chancellor conceded that this was impressive. It did not, however, have any immediate effect.

One very conspicuous instance of the influence of sectional opinion on legislation and law has been the fluctuating recognition of trade unions. The progress of statute law affecting unions is closely correlated with the swing of the political pendulum: the leftward movement being represented by the Trade Union Acts of 1906, 1913, and that of 1946 restoring the *status quo* of 1906; the rightward by the Taff Vale decision of 1901, the *Osborne* judgment of 1909, and Trade Disputes and Trade Unions Act of 1927, following the failure of the General Strike.

It is fair, therefore, to say that despite the great growth of the power of the Executive and the increased regimentation of members, Parliament is still fairly susceptible to currents of public opinion, both general and specialised, and as compared with the nineteenth century the widened franchise, the spread of education, and the increased political consciousness of the middle and working classes have all increased the general body who have opinions about questions involving legislation and thereby reflected in changes in statute law. To a considerable extent this subservience to public opinion is deliberate, as when Departments court the views of interests concerned, and to some extent it reflects the fact that one major political party has an avowed object to help and placate and ameliorate the conditions of the working classes. Also it is largely an essential facet of a working democratic system in a moderately free community, where the democratic process is not exhausted by electing a representative periodically, but it does so and then keeps him and his fellows constantly subject to a barrage of public and private comment, encouragement, criticism, denunciation and praise. The Member is thus never allowed to forget public opinion particularly as reflected in his constituency and this cannot but affect his attitude to legislation and matters before the House.

The Period of Socialism

When Dicey surveyed the topic of law and opinion just after the end of the nineteenth century he found it possible to distinguish three periods therein, in each of which one main current of opinion could be discerned as influencing the law. The period of old Toryism or legislative quiescence originating as far back as 1760, was in full flood in 1800, and slackened about 1830. The period of Benthamism or Individualism covered the years 1825 to

1870 and the period of Collectivism covered the years 1865 to 1900. In surveying the next fifty years it seems justifiable to say that collectivism ran on to about the fateful year 1914, but that from about 1905 a more radical strain was apparent, and this has gained rapidly increasing influence thereafter down to the present time. This period we may designate the period of Socialism, not so much by reference to a political creed, because British Socialism has been as much ethical and utilitarian as Marxist in its earlier days, but because the years since 1914 have been marked by greater and greater insistence on social considerations at the expense of individual ones, and by legislation more frankly socialistic than merely collectivist. Legally it is the period of the "socialisation of law" to adapt it to serve the interests of the majority.

Numerous considerations combine to make it desirable to treat the years since 1905 as a separate period rather than as a continuation of tendencies visible prior to then. The Liberal governments of 1905–1916 initiated measures of social reform at an unprecedented rate, legislation on workmen's compensation, medical inspection of children, protection of children, town planning, eight-hour day for miners, sweated industries, and small holdings, but their main achievements in the social welfare sphere were the Old Age Pensions Act, 1908, and the National Insurance Act, 1911, both of which were repeatedly amended and expanded and were merely the forerunners of the great modern scheme of social insurance. Equally noteworthy was the sharp movement of taxation on to the wealthier classes, as a means of paying for attacks on poverty and squalor, which dates from 1909, and the extension of function in many directions of local government, with a further tendency for the central government increasingly to control and direct the action of local authorities, which are more their agents and delegates than independent authorities. The year 1906 saw the appearance in Parliament of the Labour Party, the effective rise of which in the period has been the outstanding feature of modern political history. In 1902 its first candidates were successful. By 1924 it had risen so far as to form a Ministry, though without a majority in the House. In 1945 it formed a Government with a large majority. Since 1951 it has been the official Opposition. The Labour vote rose steadily from a mere half-million in 1910 to twelve millions in 1945.

The rise of the Labour Party, an avowedly Socialist group, to parity with the Conservatives and the almost complete eclipse of the Liberal Party is thus the most significant political trend of the period: it is clear that by the middle of the twentieth century roughly half of the electorate held opinions which may broadly be described as socialistic: they believe in more than collectivism, in great improvement of conditions for the " bottom dogs," effected deliberately by legislative and executive action, in heavy taxation of the richer classes, and in the management of the whole resources of the country for the general benefit of the common people and particularly for themselves, they being *ex hypothesi* predominantly drawn from social and economic groups who stand to gain by socialistic measures, while as Dicey acutely observed[18] men's opinions are largely determined by their interests. " Individuals indeed, and still more frequently classes, do constantly support laws or institutions which they deem beneficial to themselves, but which certainly are in fact injurious to the rest of the world. . . . A man's interest gives a bias to his judgment far oftener than it corrupts his heart." So too Labour Party speakers are always in a position to demand measures which will benefit their supporters, and a socialist policy, whether based on the crude cry of " Soak the rich " or more sober maxims, is one naturally popular with the modern mass electorate. " The many must always be the poor, and the poor are by nature socialists. Where you have democracy there you will find socialism." " Public opinion is itself far less the result of reasoning or of argument than of the circumstances in which men are placed." [19] It does not consider a proposed policy from a detached or impartial angle, but from the angle of its own interest.

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[18] pp. 14–15.

But almost equally significant is the movement of Conservative opinion in the same direction. The Conservative party of the 1950's is socialistic to a degree which would have horrified Dicey and the Victorians. The difference between them and the Labour Party is one of degree and of method, and it misrepresents the issue between the parties to depict it as Socialism versus Individualism. It is rather a matter of more extreme socialism versus moderate socialism. As long ago as 1885 Joseph Chamberlain had seen that the widened franchise compelled greater governmental attention to social questions which affected the greatest happiness of the greatest number. In 1945 all major parties went into the election pledged to implement the main recommendations of the Beveridge Report, to establish social security and maintain full employment.

In the period of Socialism the work of the Fabians, of the Webbs, Hyndman and the S.D.F. working on the foundations laid originally by Owen, the Christian Socialists, Marx and Continental Socialism has not affected opinion more than the changes wrought by circumstances. Among those circumstances the two World Wars are profoundly important. The two wars justified and necessitated the transfer to the Government of almost absolute and unchallengeable powers for the supreme object of winning the war. During each of these two substantial periods the Government assumed powers far greater than peace-time conditions would have permitted and in spheres never previously brought under legislative control. Furthermore, at the conclusion of the Second World War when the vast emergency powers were still in being and the country had become conditioned by six years of regulation to strict control, there came to power a Government which believed as an article of faith in control and regulation and governmental action, in compulsory powers and expropriation, and some of whose more ardent members had in less responsible times actually advocated the total surrender of parliamentary functions to the Executive by the passing of a General Enabling Act which would have converted this country's government into a party dictatorship. In brief the disbelief in State intervention characteristic of Benthamite liberalism had been replaced by a very substantial belief in State intervention in most fields of government, forced by circumstances more than by theory. This transition to Cabinet bureaucracy had been caused or accentuated by various factors ; there was the concentration of power in the Executive and State-control of the whole economy during two wars, the long-term tendency to replace *laisser-faire* by planned control, the extension of social welfare services, the development of a great body of delegated legislation, the growth of party organisation and discipline in the House, the payment and semi-professionalisation of M.P.s, and the restriction of debates so as to push through governmental business. Legislation too is now almost entirely a matter of government business.

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[19] p. 26.

It is highly interesting and indicative of the shift of governmental business to note how many new ministries have developed since 1900. Equally significant is the fact that so many of these new departments deal with social welfare. The idea of bureaucracy and public departments rather than offices dates from about 1918–1920 only but since then the notion has become all too familiar and there is hardly any sphere of activity but may be touched upon by some Minister. The former idea that the function of the State was defence against external aggression and the maintenance of internal law and order is superseded by the view that its function extends in addition to the provision of countless services and the ensuring of a standard of life: the State is to be the Universal Provider. While circumstances have prompted much of this development, opinion generally approves it.

The transition from Individualism through Collectivism to Socialism may best be exemplified by examining the course of two lines of development, that of the claim of a workman who sustains injury in the course of his employment to compensation therefor from his employer, and the provision of money on the insurance principle to persons disabled from earning by ill-health, age, and circumstances of trade. In each it is significant that the prime mover in the scheme has been the State, and the developments have been effected mainly by legislative intervention.

Dealing first with the case of the injured workman the common law had long given him a right of action against his employer for damages, but to recover damages he had to go through the tedious and expensive procedure of a litigation and to prove default or negligence in some respect on the part of the employer, which was not always easy. Moreover, in 1837, the English courts in *Priestley* v. *Fowler* (3 M. & W. 1) adopted the doctrine of "common employment," whereby the employee was deemed to have voluntarily taken the risk of the negligence of a fellow employee and was debarred from recovering damages if the negligence were the latter's and not directly attributable to the employer. The doctrine reeks of individualism and a *laisser-faire* belief in freedom of contract. In 1858 the House of Lords extended the doctrine to Scotland (*Bartonshill* v. *Reid*, 3 Macq. 266).

By 1880 the tide of individualism was ebbing and the Employers' Liability Act of that year restricted the application of the doctrine in certain cases while there were moves to abolish the rule altogether.

Then in 1897 came the beginning of a wholly new principle. The Workmen's Compensation Act of that year threw aside the question of fault on the part of the employer and provided that in certain industries where a workman sustained injury from an accident "arising out of and in the course of the employment" he should receive compensation from the employer at fixed scales. Proceedings were partially removed from the courts and entrusted to the county court judge or the sheriff as arbitrator. But provisions for appeal to higher courts by way of stated case kept the proceedings much before the courts and hundreds of cases were stubbornly contested to the final court of appeal. The Act was, in 1900, extended to persons employed in agriculture and in its later forms it covered a large part of the working population.

The scheme, moreover, did not wholly oust the common law claim for damages in that such an action could be brought alternatively to or in the event of failure of a claim for compensation, but in such a case the workman was thrown back on the difficulty of proving negligence and might be met by the " fellow-servant " rule. The courts, however, to some extent mitigated the harshness of the " fellow servant " rule by developing the conception of broad overriding duties of the employer to provide a safe system of working, safe plant, and suitable appliances, duties which could not be delegated to subordinate staff. These doctrines received their classic formulation in *English* v. *Wilsons & Clyde Coal Co.*, 1937 S.C.(H.L.) 46; [1938] A.C. 57. The development of these doctrines materially assisted the injured man in his claim. Then in 1948 the rule of common employment was abolished by statute and an injured man, while still entitled to claim damages from his employers, became, in addition, whether or not he claimed or recovered damages, entitled to benefits from the National Insurance and Industrial Injury Schemes, run and partly financed by the State, and covering a wider range than any previous workmen's compensation scheme. As under the workmen's compensation scheme, fault was irrelevant: the principle was that a man injured at work was to receive compensation for his loss. The trend has thus been uniformly to benefit the workman.

The provision of an assured income in cases of sickness, age, or unemployment has followed not dissimilar lines since 1900. The old poor law had then ruled for three centuries without radical change but the Royal Commission on the

Poor Laws and the Relief of Distress of 1909 had shown a movement against its form and spirit. In 1908 the first (non-contributory) Old Age Pensions Act was passed, providing for a maximum pension of 5s. per week to persons of strictly limited income over the age of seventy. In 1919 the maximum was raised to 10s.

In 1911 came the first National Insurance Act. It comprised distinct schemes, that for National Health Insurance applicable to almost all employed persons over sixteen, and that for Unemployment Insurance applicable to only certain selected trades. The latter part had been foreshadowed by the Unemployed Workmen Act of 1905 which had required local authorities to establish distress committees to relieve unemployment. The unemployment scheme was extended to some munition workers in the 1914–1918 War and, by an Act of 1920 to almost all manual workers, and non-manual workers earning less than £250 per annum. The main exceptions remaining were agriculture, domestic service, and certain other specified classes of employment.

Contributory pensions were introduced in 1925 when the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, established in conjunction with existing O.A.P. and N.H.I. a scheme for contributory pensions for widows and orphans and insured persons between sixty-five and seventy (when they passed over to non-contributory pensions). Blind persons over fifty were by 1920 brought under the non-contributory scheme.

The Unemployment Act, 1934, made provision for the unemployed by means other than insurance or poor relief, by allowances, training courses and assistance for those in need of work. In 1935–1936 these various branches of the law were consolidated separately. The Unemployment Insurance (Agriculture) Act, 1936, brought agricultural workers within the scope of unemployment insurance. Unemployment assistance remained under Part II of the Unemployment Act, 1934. While the system was as good as in any country, there were gaps in the scheme and it was not comprehensive.

In 1941 the Committee on Social Insurance and Allied Services was appointed under Sir William Beveridge. It reported in 1942 that social security must be achieved by co-operation between the State and the individual, and that the organisation of social insurance should be treated as part only of a comprehensive policy of social progress, as an attack on Want, which with Disease, Ignorance, Squalor and Idleness hindered reconstruction and the full development of the human personality.

The scheme proposed was the logical conclusion of all the individual schemes of the past. It swept them all into one scheme embracing all persons in the community and all needs. The benefits were considerably greater than those under earlier schemes. The proposals of the Beveridge Report were implemented in 1945–1948, while the furtherance of education and the protection of children received separate attention.

Other provisions tending in the same direction were the Legal Aid and Advice Act, 1949 (England) and the Legal Aid and Solicitors (Scotland) Act, 1949, which aim at providing assistance in obtaining legal services and advice. The whole of this progress has accorded with a public demand, prompted largely by the misery of the depression in the 1930's, that persons should have a legal right to at least a moderate maintenance and assistance in case of need from State funds.

Public Opinion and Public Law

The period has been called one of Socialism. The trends most noticeable in public law have been authoritarian and bureaucratic. The period has been marked by an enormous extension of governmental activity, taking over industries and services previously provided by private enterprise and administering them for the general benefit, but through a complex machinery which leaves the individual no choice in the matter, no voice in their management, and even Parliament with no effective control, and by an equally enormous creation of governmental services. In 1900 the State supervised education and the poor law. Now in addition it manages insurance schemes, runs hospitals and health facilities, and tends and looks after its citizens with what many find is burdensome and expensive solicitude. Public opinion has in general undoubtedly been favourable to this trend: in part it has been stimulated by political demands calling for the utilisation of more of the national resources for the benefit of common people, in part it has been the consequence of circumstances, of two world wars and an unparalleled economic depression, circumstances to which only the controlled and directed resources of the whole nation could have been equal.

Two consequences have followed from this trend: the increasing extent and scope of legislative action, and the growth of administrative law. Not only has Parliament been passing more and more legislation, but it has been growing increasingly complex and steadily more far-reaching in effects and importance, effecting more radical changes than ever before. Whole industries have been swept into the laps of newly created statutory corporations, the whole transport system of the country was taken over at one grasp, and enormous quantities of assets have been taken into nominally national control. Land is regularly acquired compulsorily for roads and housing: agriculture is subsidised and largely controlled. Statutory regulation has invaded every realm of human activity.

Conformably to the advance of democracy and the increasing importance of the ordinary individual, the lower House of Parliament has achieved steadily greater importance and it has twice, in 1911 and 1949, imposed a legal check on the power of the Upper House to hold up legislation. In both instances those checks were imposed in answer to actual or threatened interference with professedly socialistic legislative measures. It is probably only to a moderate extent that public opinion has actually sought and desired these developments but it has certainly acquiesced in them. In part this is due to apathy and ignorance, in part to belief in governmental action in the interests of the governed.

Since 1900 the growth of administrative law has been a very important factor. There had been earlier instances of all its manifestations, delegated legislation, decision of disputes by administrative persons or tribunals, and the qualification or exclusion of judicial review and appeals to the ordinary courts. Though Dicey himself had by 1915[20] qualified his own former view, that view, that there was no administrative law in Britain, persisted and still to some extent bedevils discussion of the topic. About 1930 an outburst of literature gave rise to new misconceptions and resulted in the appointment of the Committee on Ministers' Powers, 1929–1932. Administrative law is now of increasing importance and is receiving adequate, careful, and less wildly vituperative attention than it did twenty years ago. The growth of administrative law has been caused and, indeed, necessitated by the expansion of public administration and governmental functions in every direction. Legislation on large and complicated subjects requires machinery for effectuating and applying and amending it in detail without continual recourse to an overworked Parliament. So too schemes of national insurance and pensions require the adjudication of numerous controversies more quickly and cheaply than could be done by recourse to the courts. Moreover, the new legislation and the extension of public administration have required the establishment of new standards unknown to or different from those of common law, such as suitability of land for housing, availability and capacity for work, exceptional hardship, standard of good husbandry, and so on.

This growth has, however, been haphazard and uncontrolled. The composition, procedure, and working of the various tribunals varies greatly: legal representation is sometimes prohibited: decisions are too often not published or equipped with reasons, and there is no provision for a general court of administrative appeal.

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[20] 31 L.Q.R. 148.

Delegated legislation has similarly pursued an ungoverned course of development. Some improvement was effected by the setting-up of the Select Committee on Statutory Rules and Orders in 1944 (renamed in 1946 the Select Committee on Statutory Instruments). So too the Statutory Instruments Act, 1946, replacing the Rules Publication Act, 1893, made reasonable provision for the procedure for subsequent publication of statutory instruments, but not for antecedent publicity.

The limitation or exclusion of judicial review has been effected partly by the very wide terms in which Parliament has conferred powers on the Executive, but partly by the surprising tameness with which the courts have let their authority be ousted. The first of these is a fault of doctrinaire political Socialism with a belief in the ability of the bureaucrat, the latter partially unavoidable owing to the canons of statutory construction and doctrine of precedent. In this branch of legal development public opinion has had little direct part: it is probably almost entirely ignorant of it all. The only point of contact is that in some cases the responsible Minister is required to consult interested bodies or an advisory committee before issuing regulations, and sometimes must submit draft regulations to such a body. But the growth of delegated legislation and the ousting of the jurisdiction of the courts in favour of statutory tribunals has been largely unnoticed except by lawyers. Public opinion does not seem either to have called for it or to have protested against it. Circumstances as much as anything have brought it about.

Public Opinion and Private Law

It has already been observed that public opinion, however expressed, has in general little knowledge of or interest in changes in private law. So far as Parliament is concerned it is a matter of some difficulty to find time to put through any measure altering private law unless it is put forward as an agreed measure or is non-contentious. The radical changes wrought by the English property legislation of 1925 are the exception which proves the rule. Only the drive of a masterful Lord Chancellor could have put through such a mass of highly technical law-making. The only topics of private law on which public opinion finds much expression are divorce and criminal law and even in those fields the general opinion is frequently behind that of the experts. "In this country public opinion lags far behind official thought in the modern treatment of crime and for the most part is uninterested in the subject."[21] Punishment is now essentially reformative in aim, with prevention and deterrence receiving rather less attention. Retribution is no longer an object of penal policy. The modern trend too is all towards individualisation of treatments: thus Borstals were started in 1908 and have had a considerable proportion of success particularly with youths who have not previously been contaminated by mixing with a prison population. The latest Criminal Justice Acts of 1948–1949 restrict imprisonment and provide for remand homes, remand centres and detention centres. Conditions in prisons have been greatly improved, though much still remains to be done in this connection, and different types of prisoners have been segregated. Again juvenile courts have been instituted to deal with young offenders and approved schools may take them. Probation has been used with considerable effect particularly with young and first offenders: discharge, conditional or unconditional, is being increasingly used, and there has been a decreasing faith in the efficacy of imprisonment as a generally satisfactory method of treating criminals. Capital punishment has been reduced as far as it can be short of complete abolition and on this topic public and parliamentary opinion is fairly evenly divided. The whole movement of the twentieth century has been away from terror and severity of punishment and penal policy has been called " bold, consistent and experimental." [22]

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[21] East, *Society and the Criminal*, 150.

But much of this has resulted from expert study and opinion rather from general public opinion and in some respects public opinion is even an obstacle to progress. Thus Norwood East (*Society and the Criminal*, 62) has remarked in connection with the increased use of psychiatry that if the injury done by the crime is slight, public opinion is apt to decline medical evidence which advises a considerable period of restraint to effect a cure and change a habit of mind which results from minor mental abnormality. One of the duties of psychiatry is to educate public opinion to accept possibly prolonged treatment, even though the damage done may have been slight.

In other respects, however, public opinion has influenced criminal law. Thus it has been observed that the Capital Punishment Commission of 1866 had found a divorce between law and public opinion in relation to the offence of child killing and that in consequence it was practically impossible to get juries to convict mothers of murder or manslaughter of infants. In the result the Infanticide Act, 1938 (superseding an Act of 1922) was passed. Such a case is, however, the exception which proves the rule.

Divorce is one of the few topics of private law which attract public attention and about which public opinion may definitely be said to exist. Divorce had existed from 1573 in Scotland and from 1857 in England, but down to the end of the nineteenth century it was socially reprobated and entanglement in a divorce case, even for an innocent party, was liable to be socially disastrous. The increasing emancipation of women, egalitarianism, the breaking down of religious and moral convictions of the sanctity and permanence of marriage, and the social ferment and upheaval of the First World War all helped to make for changes, and it was apparent that opinion was in general coming to favour an extension of freedom of divorce. This was conceded by the Herbert Act of 1937 for England and its 1938 counterpart for Scotland. The rush to take advantage of these provisions, admittedly stimulated by the abnormal conditions of the Second World War and its aftermath, show that opinion generally desired and was ready to take advantage of easier divorce. Even when the peak of the post-war divorce rush had been passed, the rates in both England and Scotland remained much higher than before these Acts. Nor is there any great social stigma apparently left. The churches, however, maintain a more rigid view but opinion, as compared with the nineteenth century, pays so much less heed to the views of the Churches that this has distinctly less effect than it might have had a century ago. Divorce is quite a recognised institution now, so much so that its prevalence is giving rise to serious problems and anxious consideration. The whole social institutions of marriage and the family seem at times to be in danger, and the Royal Commission on Marriage and Divorce of 1951–1955 received a bewildering variety of recommendations on the subject. Yet clearly divorce has come to stay and there seems little likelihood of the grounds being narrowed or of the number of divorces being seriously reduced. It is an accepted fact of social life.

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[22] Radzinowicz (1939) 3 M.L.R. 127.

Reparation or tort shows substantial influence of the prevailing opinion of the period though it has been only moderately affected by direct public opinion acting through legislation. Such statutes as the Factories Act, 1937 (and the various Dangerous Trades Regulations made thereunder), and the Coal Mines Act, 1911, are only the current formulations of legislation which goes back to a much earlier period, and their creation of statutory duties enforceable by an action in negligence by an injured person is only an indirect consequence of them. But the courts have tended to construe those duties strictly against the employer[23] rather than holding, as they might conceivably have done,[24] that they merely re-echoed the common law and imposed no higher duty than that of reasonable care. But quite apart from statutory duties, of which there have been held to be many, the courts have tended to screw up the standard of duty imposed even at common law. Thus the formulation of the employer's common law duties of care in *English* v. *Wilsons and Clyde Coal Co.* is far more stringent than could have been conceived half a century earlier.

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[23] *McMullan* v. *Lochgelly Iron Co.*, 1933 S.C.(H.L.) 64; [1934] A.C. 1; *Riddell* v. *Reid*,, 1942 S.C.(H.L.) 51; [1943] A.C. 1.

Furthermore, the decision in *Donoghue* v. *Stevenson*,[25] though foreshadowed by dicta in the nineteenth century, really made a striking development in the law by establishing beyond doubt a general principle of liability for negligent harm to persons possibly unknown to the wrongdoer but who, if he had directed his mind to the wrongdoing, he must have contemplated might be harmed, and this principle has already shown itself to be the fertile mother of many actions, though some limits have been set to its capacity to swallow up all other existing grounds of liability.[26] Negligence has grown to be the greatest single cause of action and almost seems fated to incorporate other grounds of liability. The other general characteristic of twentieth-century tortious or delictual liability has been the increasing imposition of strict or absolute liability. There has been an increased and extended liability for the acts of one's servants and even independent contractors, *e.g.*, *Lloyd* v. *Grace Smith & Co.* [1912] A.C. 716; *Honeywill & Stein* v. *Larkin* [1934] 1 K.B. 191, which rather indicates an advance of the idea that the person in general control of the enterprise or who initiated the whole risk should be held liable. How far public opinion has directly contributed to these changes is very doubtful, but it is clear that the general trend is the same way as the legislative policy which gave rise to Workmen's Compensation, Factories Acts and Dangerous Trade

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[24] *e.g.*, Lord Mackay (diss.) in *Millar* v. *Galashiels Gas Co.*, 1948 S.C. 191 (affd. 1949 S.C.(H.L.) 31; [1949] A.C. 275).

[25] 1932 S.C.(H.L.) 31; [1932] A.C. 562.

[26] *e.g.*, *McPhail* v. *Lanark C. C.*, 1951 S.C. 301; *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

Regulations, and Industrial Injuries Acts, namely, to find the injured person entitled to compensation unless the employer was clearly not at fault and sometimes even independently of fault altogether. Movements in the same direction are the restriction and eventual abolition of common employment, the softening of the master's common law duties of care, the extensions of the principle of *res ipsa loquitur* and the restriction of *volenti non fit injuria*, and the statutory reform of contributory negligence whereby a claimant's own fault to some extent does not wholly defeat his claim but results only in a modification of the damages awarded to him. All these trends have moved the balance in favour of injured parties and against their employers in a socialistic direction.

The statutes of the twentieth century which have affected this branch of law have been few: the Crown Proceedings Act, the Law Reform (Contributory Negligence) and Law Reform (Personal Injuries) Acts and a few others. Pressure of informed legal opinion rather than of general public opinion has prompted them, and in relation to the whole field of reparation and tort they have made only modest changes. The important developments have been worked out by the Bench, but reveal a spirit consistent with the movement of opinion in other fields.

D. M. WALKER.

(To be continued.)

DIVINE JUSTICE AND HUMAN JUSTICE *

I FEEL that it is my duty to explain, first of all, that I have accepted the kind invitation to deal with so difficult a subject as this (" sì forte fu l'affettuoso grido ") only after giving a warning that it would be impossible to develop it in its entirety. I will therefore limit myself to a few simple observations.

The idea of Justice is inborn in the human mind (" per naturam impressa mentibus "), although our knowledge of it, as of all the eternal verities, is developed only by stages. Right from the very beginnings of human existence—of living in communities, we can say, because human life is essentially social—Justice is expressed in a certain order; that is, in a complex of norms regulating and limiting human behaviour; standards not at first expressed in words and thought out, but none the less effectively followed, just as all unconsciously the rules of syntax and of grammar are followed even by the illiterate and by savage tribes.

A positive juridical order of this sort is, however, far from satisfying in full the demands of the human conscience, even when, with the passing of time, that order has risen from its primitive and embryonic phases to a certain degree of technical perfection. We may say, rather, that the defects of the system positively in force draw attention to themselves much more in the advanced phases of their development than in the elementary phases, in which the " just " is frequently confused with the " command." But at all times, and especially in moments of crisis, we hear Eternal Laws, that is, Divine Justice, being invoked above the changeable impositions of human governors and legislators. Everyone, I think, recalls the classic appeal of Sophocles' Antigone to the *ἄγραπτα κἀσφαλῆ θεῶν νόμιμα* against a cruel tyrant's veto. There is no need to cite other examples, both ancient and modern.

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* Lecture delivered at the XIIIth Course of Christian Studies at Assisi, September 1, 1955. Translated by H. McN. Henderson.

Even a thinker inclining to scepticism, like Renan, has recognised the necessity for such appeals. "Dans une de ces situations tragiques, Dieu est en quelque sorte le confident et le consolateur nécessaire. Que voulez-vous que fassent, si ce n'est lever les yeux au ciel, une femme pure accusée injustement, un innocent victime d'une erreur judiciaire irréparable, un homme qui meurt en accomplissant un acte de dévouement, un sage massacré par des soldats barbares? Où chercher le témoin vrai, si ce n'est en haut?"[1]

The problem is posed thus: how can we know the Divine, that is, the absolute? Since knowledge implies a relationship (between a subject and an object), to know the absolute is almost a contradiction in terms, in as much as the absolute (it is said), in so far as it is known, becomes relative. We are not evading the force of this objection; but we do not think that it is insuperable. There is knowledge and knowledge: there is that which is based on the data of the senses and on physical experiences, and there is that which relies on an unequivocal requirement of our spirit, which can be confirmed by no experiment of the senses, but, be it noted, neither can it be denied, for the very reason that it belongs to an order of truth transcending worldly phenomena. There are certainties (*e.g.*, that of our free will and of our imputability) which no mechanical instrument has ever demonstrated, nor could demonstrate, but which impress themselves in an absolute manner on our consciences in such a way that we could not cast them aside. The same can be said of the so-called "voice of duty," which Rousseau rightly called the "celestial voice."

In such certainties of the metaphysical order there is—let us admit it—something mysterious. Did not a great philosopher say, "Liberty is a mystery"? But such, precisely, is our fate, to belong on one side to the physical world, and to be at the same time in touch with the world of absolute values to which we are drawn by an indomitable desire within our spirits.

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[1] E. Renan, *Feuilles détachées* (Paris, 1892), p. XXVIII.

Let us begin with respecting the great mystery that is above us and also within us, since it is in our inmost selves, if we listen to it well, that we perceive it. We shall then be on the way of Wisdom and of Faith. This, unless I am mistaken, is the meaning of the Bible saying, " the fear of the Lord is the beginning of Wisdom." Let us not smother, by reason of our proud and vain pretensions to know everything and to believe only that which we can touch with our hands, the ineffable desires and hopes that alone make sense of life and allow us to bear its sorrows. Let us remember, rather, Dante's words: " State contenti, umana gente, al quia . . ."

If, because of the limits of our intellect, we cannot wholly come to know the " ratio divinae sapientiae " that rules the world (*lex aeterna*), we can and must cling to the *lex naturalis*, which is its reflection and is scaled down to our nature (" secundum proportionem capacitatis humanae naturae," to quote St. Thomas Aquinas' precise words). We have next, in the third place, the *lex humana* (" ab hominibus inventa "), which must be a more detailed specification of the *lex naturalis* but must never contradict it, far less the *lex aeterna*.

But not only the *lex naturalis* and the *lex humana* suffice to direct human activity, but assuredly so also does the *lex aeterna* (divine) which addresses man to an ultimate, supernatural, end.[2] We must aim at a supreme ideal of salvation and of perfection, even if by reason of the poverty of our intellects we cannot work out for ourselves an adequate conception of that ideal. It is, I repeat, an aspiration, a calling, a longing, which draws us towards this absolute ideal, and which is more valid than the empirical observation of any tangible object whatsoever.

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[2] See St. Thomas Aquinas, *Summa Theologica*, Ia IIae, 91, 4, ad 1 and 93, 2, where he explains how we have a certain knowledge of the *lex aeterna*, not " secundum quod in seipsa est," but " secundum aliquam ejus irradiationem."

It is clear that an ideal transcending all worldly experience and yet imposing itself on our spirits as a supreme goal does have the characteristics of the Divine, even if—not to take the name of God in vain—we do not wish to identify it with the Divine Being. In that supreme ideal state we must place the synthesis of every virtue and therefore also that of Justice—a Justice, however, different from and higher than human Justice.

Some characteristics which analysis has brought us to discern in human Justice lose their significance in comparison with divine Justice and are not applicable to it. Thus, for example, while in Justice, as we experience it, there is always a bilateral relationship, through which to each obligation there is a corresponding claim, we certainly cannot speak of obligations on the part of the Divine, nor of any claim against it. So again, if we distinguish Justice as " distributive " and " commutative," it is easy to perceive that no commutation or exchange of goods of equal value is possible between the Divine and Man. Moreover, the distribution and redivision of goods must be conceived of in a different manner, according to whether it happens because of divine Justice or human Justice. The theological disputes on this point are so numerous that it would be impossible to summarise them here: let us just recall, as an indication of the difficulty and delicacy of the argument, that a Portuguese theologian, Rebelo (Rebellus), wishing to apply the Aristotelian schemes of Justice to divine Justice, proposed the terms: *Justitia supercommutativa, superdistributiva, superlegalis and superpunitiva.*[3]

It is more important to note that in divine Justice, according to Christian thought, Justice is accompanied by Mercy, while among men, these two virtues are separated and often appear in contrast to each other. This was observed by St. John Chrysostom, commenting on the words of the psalmist, " Domine, exaudi me in tua

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[3] F. Rebellus, *De obligationibus justitiae, religionis et charitatis* (Venetiis, 1610), pp. 26–38.

justitia "[4]: " apud homines justitia privatur misericordia; apud Deum autem non item, sed justitiae quoque admixta est misericordia, et tanta, ut ipsa etiam justitia vocetur clementia."[5]

Many interpreters (also with reference to Dante's words: " Misericordia e giustizia li sdegna," *Inferno*, III, 50) understood these two attributes in the sense of alternatives, so that the Divine would be sometimes just and sometimes compassionate. But the more correct interpretation seems to be that the two qualities are united in the conception of a superior, perfect virtue, which is attributed to Divinity.[6] That does not prevent one or other aspect of that same virtue from appearing to us to prevail, according to its various individual applications. So severity would seem to prevail in the Old Testament and gentleness, on the other hand, in the New. But already in the former the two attributes are closely linked together so as to form one single entity (*e.g.*, Psalm 116, v. 5: " Merciful the Lord is, and just, and full of pity,"[6a] etc.). Similar declarations are found in the writings of the Fathers of the Church, for example, Origen, St. Ambrose, etc.

The superiority of divine Justice compared with human Justice lies principally in its synthesis with mercy; and so in the most lofty Christian conception it embraces also the gift of Grace and the mystery of Redemption. It is no wonder that when compared with such loftiness, human Justice appears to be a very poor thing, so as even to be considered sometimes as Injustice. " Non ergo Deum nostrae justitiae similem cogitemus," wrote St. Augustine, " quoniam lumen quod illuminat, incomparabiliter excellentius est illo quod illuminatur."[7] St. Gregory the Great says: "Humana justitia divinae justitiae comparata, injustitia est."[8]

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[4] Psalm 143, v. 1 (142).

[5] In Migne, *Patrol. graeca*, T. LV, p. 448.

[6] See especially St. Thomas Aquinas, *Summa Theologica*, Ia, 21, 4. *Cf.* R. De Mattei, " Misericordia e Giustizia nella Patristica e in Dante " (in *Giornale Storico della letter. ital.*, Vol. CIX, 1937). On the concept of *justitia Dei*, see also G. Gonella, " Aspetti teologici del problema della giustizia " (in *Archivio di Filosofia*, year VIII, 1938, Fasc. II).

[6a] R. A. Knox's translation.

[7] St. Augustine, *Epist.* CXX, C. IV, § 19–20 (in Migne, *Patrol. lat.*, T. XXXIII, p. 461).

At this point we can, however, pose the question whether it would not be possible for human Justice, drawing its inspiration from that higher conception, to receive—within its own limits and forms, of course—the demands of Charity and Mercy together with those of Law. To this question we do not hesitate to give an affirmative answer. That is just what has already happened, to a small degree, in the field of so-called social legislation (workers' insurances, assistance for poor families, etc.), and we can also find some slight traces of it in recent reforms of penal law (*e.g.*, in the introduction of judicial pardon). But, if we consider the problem in its generality, we must admit that reforms of quite another kind and much more radical in nature would be necessary.

An ancient writer has distinguished three kinds of Justice: *justitia Dei, justitia hominis, justitia diaboli.* "Justitia Dei est reddere bonum pro malo; justitia hominis est reddere bonum pro bono, malum pro malo; justitia diaboli est semper reddere malum pro bono."[9] As for this last formula, it may seem a paradox to call Justice the diabolic rendering of evil for good. But there is no doubt that this happens all too often in our wicked world; how many times the purest and most virtuous of men have been hated, punished, and persecuted! A pessimistic philosopher affirmed categorically, "We always pay the penalty for our virtues." If in this saying there is a certain exaggeration, it is only too true that vices, ignorance, and unbridled passions have a malignant effect on the lives of the individual and of society. It is an effect that sometimes besmirches and perverts the making of law itself, so that in some laws, ancient and modern, we can in reality perceive something of the Satanic.

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[8] St. Gregory the Great, *Moralium*, L. V, C. XXXVII, § 67 (in Migne, *Patrol. lat.*, T. LXXV, p. 716).

[9] Godfrey, Abbas Admontensis, *Homilia Domin.* LII (in Migne, *Patrol. lat.*, T. CLXXIV, p. 350).

As far as so-called *justitia hominis* is concerned, the conception of " reddere malum pro malo " is still in fact the basis of our penal systems; more precisely, in the words of Grotius, " malum passionis quod infligitur ob malum actionis." It is, however, obvious that such a conception is in contrast with the *justitia Dei*, that is, with true Justice, not only according to the passage just quoted, but also according to others much more important and authoritative. Let us remember, for example, the words of St. Paul: " Be not overcome of evil, but overcome evil with good " (Romans xii, 21), and those of St. Peter: " Not rendering evil for evil, or railing for railing: but contrariwise blessing. . . . For it is better, if the will of God be so, that ye suffer for well doing, than for evil doing " (I Peter iii, 9, 17). And we could remember also, in a fuller sense, those Gospel sayings which bid us love our enemies (Matthew v, 20, 43 *et seq.*).

The opinion that it is lawful to inflict suffering on the authors of crimes is, however, so deeply rooted that this formula (corresponding, in substance, to the law of talion) is accepted without discussion in all or nearly all treatises on penal law, while it finds concrete application in the harshness of our present-day prison systems.

If, on the other hand, we start from the conception that evil is truly remedied only with good, we must substitute for that formula another, namely, *bonum actionis propter malum actionis.* Let it not be thought that this new formula signifies a renunciation of the struggle against crime; rather, it opens a gateway to an activity which is much more efficacious against it, as we shall briefly attempt to make clear.

Above all it is beyond doubt that the right of legitimate self-defence must remain: this, however, does not have as its end the infliction of suffering, but only the prevention of wrong. Legitimate defence, be it noted, can include even grave restrictions on the personal freedom of dangerous individuals, such as are applied, for example, to lunatics, on whom, of course, no one proposes to inflict suffering.

Another rational principle that remains unshaken is that any crime whatsoever implies an obligation to make good the loss; this principle is generally recognised in theory, but in practice it is neglected almost entirely. Who could maintain that the penal systems at present in force further the fulfilment of this obligation? Rather, is it not true that they prevent it, removing almost always from the punished the possibility of profitable work? One might add that the penalties such as are in force today compel the condemned man to fail in his duties towards helping his family; meanwhile, they also cause cruel sufferings (especially in the case of long term or life imprisonment) to the innocent relations of the condemned. This last consideration, I think, would be enough to make at least some doubt about the Justice of present penal systems arise in the conscience of every upright man.

That these systems do not achieve the purpose of inducing the guilty to mend their ways and redeem themselves spiritually is all too well known. There are numberless cases of men who, newly freed from gaol, commit new crimes that have perhaps been thought out or learned from their fellow-prisoners in the gaol itself. The moral re-education of the delinquent ought to be undertaken with quite different means and in quite different surroundings.

That the length of time of penal detention for various crimes is fixed by positive legislation in an empirical manner completely devoid of any scientific basis is equally manifest. It is only through a vain illusion that one can think that the disturbance of the legal order caused by one crime is repaired because its author is held in gaol for a certain number of days or months or years; meanwhile, the loss resulting from the crime, to individuals and to society as a whole, has not been made good by these nor by any other means. We can see that present systems not only leave unpaid, in the vast majority of cases, the elementary need to make good the loss (even though this is laid down in some articles of the law that nearly always remain a dead letter), but it is also clear that no attempt is made to reach a true estimation of the loss itself—yet surely that ought to be the first task of Justice.

To obtain just Reparation, in my opinion, there ought to be instituted a system of watchfulness over the bearing of the convicted person, who ought to be obliged to work; a system, I mean, readily admitting various degrees, so as, above all, to put to the test the good will of the convict, having recourse only in most serious cases to direct forms of coercion, and excluding at all times those vexatious and inhumane forms that belong to outworn legal systems.

Let us not forget, above all, that our hopes of winning the struggle against crime must have as their foundation the building of a healthy society by means of the moral and material elevation of the most needy classes in the light of Christian principles of Justice and Charity. These are the foundations on which we must build, rather than on the use of physical punishment whose ineffectiveness has been demonstrated by history itself and is still made manifest every day. Perhaps I may repeat here the beautiful and lofty words of Settembrini. " O voi che fate le leggi e che giudicate gli uomini, rispondetemi e dite: Prima che costoro fossero caduti nel delitto, che avete fatto voi per essi? avete voi educata la loro fanciullezza, e consigliata la loro gioventù? avete sollevata la loro miseria? li avete educati col lavoro? avete voi insegnato ad essi i doveri del loro stato? avete loro spiegato le leggi? Voi che vi chiamate lucerne del mondo, avete voi illuminati questi che camminavan nelle tenebre dell'ignoranza? E se non avete fatto questo, che era vostro dovere, e non avete voi colpa a'delitti loro? or chi vi dà il diritto di punirli? E voi che li punite secondo la vostra legge e la vostra giustizia, voi sarete giudicati secondo un'altra legge e un'altra giustizia."[10]

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[10] L. Settembrini, *Ricordanze della mia vita* (Bari edition, 1934), vol. II, p. 41. This passage may be translated:

" You who make the laws and judge mankind, answer me and say: Before they were fallen into crime what did you do for them? Did you educate them in their childhood, and counsel them in their youth? Did you cheer them in their misery? Did you educate them with work? Did you teach them the duties of their status? Did you explain to them the laws? You who call yourselves the lights of the

Two further reflections are perhaps timely before I close this short lecture. Comparison between divine Justice and human Justice is very valuable for warning us that our judgments are not infallible; therefore we must go warily, especially when we are moved to condemn. The writers of the Gospels refer to this: "Judge not, that ye be not judged" (Matthew vii, 1); "Condemn not, and ye shall not be condemned: forgive and ye shall be forgiven" (Luke vi, 37). Ultimate Justice, the supreme condemnation, like the supreme reward, belongs to God, rather than to men, for its basic assumption is Infallibility.[11] Never let us forget that we ourselves are subjects to be judged, and we cannot presume to be free of blame and sin: we must be mindful that if we entertained such a presumption, we would thereby commit the sin of Pride. Let us recall the awful question: "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" (Matthew vii, 3). From this we ought at least to draw the conclusion that the most severe penalties are almost always the least just, and that in every case a review of them ought to be permitted.

There is another error we must be on our guard against: it is that of considering Law as the only rule of life. In the highest Justice, as we have already noted, Law is united with Mercy. Thus if we wish to take that supreme Justice as our example, we shall have to remember that Law marks only a limit, but within this limit we must exercise Charity: this Charity can also require us in certain cases to renounce our Right, which is not thereby denied, but rather is it reaffirmed, since we can renounce only that which we already have. So we can, for example, forgive a debt and

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world, did you illuminate those who walked in the shadow of ignorance? If you did not do this, which was your duty, are you not to blame for their crimes? Who then gives to you the right to punish them? And you who punish them according to your law and your Justice—you will be judged according to another law and another Justice."

[11] Hence the words: "Vengeance is mine, I will repay, saith the Lord" (Romans xii, 19; Hebrews x, 30). *Cf.* Deuteronomy xxxii, 35.

pardon an offence without thereby signifying any violation of Justice, as St. Thomas remarked.[12]

It would be a mistake, therefore, to think that one can fulfil every duty and be abundantly " just " only by abstaining from violating positive juridical laws and by observing them so as to gain the greatest possible profit. These laws are often rigid and narrow, and in no case do they avail, by themselves alone, to point the way that leads to the supreme good. Beyond our earthly Justice let us aim at that which is eternal, and from it let us take our standard; only so shall we find salvation for our souls.

GIORGIO DEL VECCHIO.

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[12] See St. Thomas Aquinas, *Summa Theologica*, IIIa, 46, 2, ad 3.

SCOTTISH THOUGHTS ON FRENCH CIVIL PROCEDURE [1]

THE many Scottish lawyers who, in the sixteenth and seventeenth centuries, went to France for their legal education must have been struck less by the differences between French and Scots civil procedure than by their similarities. The Scots procedure, as it is described in Sir John Skene's *Short forme of Proces, presentlie used and observed before the Lords of Counsell and Session,*[2] was evidently derived from the same Germanic and Romano-canonical sources as the French, and part of it may have been borrowed directly from French jurists and from French practice.[3] To a large extent the two systems used a common terminology,[4] applied identical legal principles, and followed similar methods. In the interval which has elapsed since the seventeenth century there have been many changes in both systems; but none are so far-reaching as to make a Scots lawyer today feel that the two systems are so distinct that their comparison would be unprofitable.

It is proposed in this article to examine, from the point of view of a Scots lawyer, the course of a civil action before the courts of first instance in France, the *tribunaux civils.* These are courts with a limited territorial jurisdiction—the *arrondissement* or vice-county—but with almost unlimited jurisdiction *ratione materiae.* Certain types of case are appropriated to specialised courts, such as the administrative or commercial courts; but these specialised courts do not have, while the *tribunaux civils* do have, "plenitude of jurisdiction" or the competency in principle to deal with any kind of dispute. There is clearly no precise analogue to the *tribunaux civils* in Scotland although, if the Outer House of the Court of Session did not exist and all civil actions came within the competence of the Sheriff Courts, the correspondence between the *tribunaux civils* and the Sheriff Courts would be sufficiently close.

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[1] The writer acknowledges the financial assistance of the Carnegie Trust for the Universities of Scotland, which enabled him to study French civil procedure at first hand. He is also grateful to the many French lawyers who generously placed their knowledge and experience at his disposal, including Maîtres Bondoux, Craffe, Lepaulle and Paret-Guérin, Avocats à la Cour de Paris; Maître Moreau, Avoué au Tribunal de Paris; and Maître Talamon, Avocat au Conseil d'État et à la Cour de Cassation.

[2] Annexed to Skene's translation of the *Regiam Majestatem*, 1609.

[3] G. Neilson and H. Paton (eds.). *Acta Dominorum Concilii* (Edinburgh, 1918), Vol. II, p. lxxvi.

[4] The Scottish terms expede, conclusions, protestation, decreet, adjournal, reclaim, executorials, diligence, etc., find their counterparts in French procedure.

Conciliation

Until recently most actions before the *tribunaux civils* commenced with a preliminary of conciliation. Since there have been suggestions that a diet of conciliation should be established in Scottish practice, the fate of the French institution is of some interest. It formed no part of the ancient French procedure, being introduced during the revolutionary period in 1790 and thereafter incorporated into the Code of Civil Procedure. The parties had to compear before a magistrate acting as mediator, the *juge de paix*.[5] The Code dispensed with this formality in certain matters, notably those which were urgent, and practice was not long in revealing that virtually all disputes were declared to be urgent by the pursuer who, following the procedure laid down for urgent cases, applied to the president of the *tribunal civil* for authority to cite the defender within shortened *induciae* and to be dispensed from the formality of conciliation. The legislature tried in vain to counter this tendency by requiring the president to state the precise grounds of urgency which justified the dispensation,[6] but this rule was not observed in practice and was repealed.[7]

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[5] The *juges de paix* are local judges of limited jurisdiction. In personal actions they are normally competent as judges of first and last resort when the subject-matter in dispute is no more than 35,000 francs in value. When the value of the subject-matter is between 35,000 francs and 150,000 france their judgments are subject to review by the *tribunaux civils*. Above 150,000 francs the case must go before the *tribunaux civils*.

[6] Decree-law of 30.10.1935.

[7] Law of 4.3.1938.

In 1949, the procedure of conciliation was abolished in ordinary actions before the *tribunaux civils*,[8] but it was expressly provided that it is open to the court at all stages of the action to attempt to conciliate the parties.

The summons

The French summons[9] was originally prayed from the court, which sent an officer to command the defender to appear. It was not very different in essence from the Court of Session summons prior to the Act of 1850, which contained *in gremio* a narrative of the facts on which the claim was based. Today the French summons is the act of the officer, the *huissier*,[10] who at the pursuer's request requires the defender to appear before the court within the *induciae*. The defender is not in fact expected to do so: in this connection the service of the summons merely imports that the pursuer has appointed his *avoué*[11] in the litigation and invites the defender to do likewise. In the *induciae* fixed by the summons the defender must design an *avoué* to represent him, who in his turn must intimate his appointment to the pursuer's *avoué*. The summons has also the object of acquainting the defender with the nature of the pursuer's claim and, at least summarily, with the grounds upon which it is based.[12]

The summons is usually drawn by the pursuer's *avoué*, although technically it is the *acte* or deed of the *huissier* who serves it. It is prepared in duplicate. One copy is handed to the defender when service is made upon him and the other copy is returned by the *huissier* to the pursuer's

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[8] Law of 9.2.1949. It was retained in a few special actions, notably actions of divorce. In divorce actions the diet of conciliation is useful also as an occasion to make interim orders for payment of aliment, custody of children, etc. Here the conciliating magistrate is the president of the *tribunal civil* and not the *juge de paix*.

[9] The technical term in French is *exploit d'ajournment*, but ordinarily the word *assignation* is used.

[10] The Scottish equivalents are messenger-at-arms and sheriff's officer.

[11] *Avoués*, who were formerly known as *procureurs*, have the exclusive right to prepare the written pleadings in cases before the *tribunaux civils* and *cours d'appel*. Different classes of *avoué* practise before the two courts, but before both the intervention of an *avoué* is compulsory.

[12] C.Pr.Civ., art. 61.

avoué. No execution of citation is placed on the summons, because the summons itself is a quasi-notarial act on the fact of citation.

Service of the summons and other items of process

In French procedure nearly every item of process, from whatever side it emanates, must be served upon the other side by *huissier*. This includes not merely the summons, but the defender's notice of appearance, the pleadings of the parties, their summary demands upon each other to lodge pleadings, documents, and the like, all incidental interlocutors, and even the final judgment itself. This remarkable requirement points to the fact that civil procedure in France, as in Scotland, is fundamentally accusatory. The initiative is left to the parties and the rôle of the court is the somewhat passive one of a referee in the dispute between them. In the days when the French courts maintained no *dossiers* or processes themselves it was indispensable that there should be a satisfactory system of bringing items of process to the notice of the other side. The rule was *un acte qui n'est pas signifié n'a aucune existence*. Since 1935,[13] provision has been made for the constitution of a process kept by the clerk of court, and a Scottish lawyer would tend to conclude that this makes service by *huissier* superfluous once the cause has become a defended one. None the less, service by *huissier* is still required in France. The summons itself must be served by the *huissier* either personally upon the defender or by leaving it with a member of the defender's family or a servant, etc.[14] When the *hussier* can find no one to accept the summons, he serves it upon the mayor of the locality and at the same time advises the defender by registered letter that he has done so.[15] No provision is made for an initial attempt to serve the summons by registered letter. It is argued in France that the *huissier* fulfils a very useful rôle because he is a mandatory responsible for his delays and mistakes, whereas the postal authorities would not be, and because he can advise parties who are ignorant of the meaning and effect of the writ. It is significant, however, that the latest official proposals for the reform of the Code of Civil Procedure envisage a preliminary citation by registered letter.[16] If every other item of process had to be served, like the summons, upon the adversary himself, the expense would be intolerable; but many items need be served upon the adversary's *avoué* only. This service is effected by *huissiers audienciers* who remain in court and deliver the items in question to the *avoués* or their clerks when they appear there. While this procedure is less costly, it is the *reductio ad absurdum* of the requirement of service by officer. A French commentator writes: "The need to have recourse to the intermediary of *huissiers* to serve these items is justified by no serious reason. It is quite clear that the *avoués* could exchange these items between themselves or through their clerks against a receipt endorsed upon the original. Service by *huissier* has no object other than to augment the profits of these officers."[17]

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[13] C.Pr.Civ., art. 79 nouveau, modified by law of 15.7.1944.

[14] C.Pr.Civ., art. 68 nouveau.

[15] *Ibid.*

Notice of Appearance

Having received the summons, the defender must appoint an *avoué* who in turn must intimate his appointment to the pursuer's *avoué* within the *induciae*.[18] This intimation is effected by deed called a *constitution d'avoué* served by *huissier audiencier*. If the defender fails to appoint an *avoué*, the court, on the pursuer's request, may grant decree against him,[19] with or without proof of the pursuer's averments. The Code requires the court to satisfy itself of the accuracy and fairness of the pursuer's averments.[20] This, however, is usually assumed, except in those cases where the public interest is concerned, such as divorce and separation. Decrees so granted are described as decrees *par défaut faute de comparaître* but they are equivalent in effect not to Scottish decrees by default, but to Scottish decrees in absence.[21] On the other hand, if the defender does appoint an *avoué*, a decree in absence can no longer be given and, even if the defender fails to lodge defences, the decree is one by default in the Scottish sense of the term.[22] In its effect, therefore, the French *constitution d'avoué* is similar to a notice of appearance in Sheriff Court procedure rather than to that of the Court of Session.

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[16] Laborde-Lacoste, *Exposé Méthodique de Procédure Civile*, p. 166.

[17] Morel, *Traité Elémentaire de Procédure Civile* (2nd ed.), p. 322. Service by *huissier*, incidentally, swells the revenue of the State, since most documents so served have to be stamped.

[18] C.Pr.Civ., art. 75. It is understood that in practice this requirement is not observed and the defender may appoint an *avoué* so long as judgment has not been issued.

[19] C.Pr.Civ., art. 149.

[20] C.Pr.Civ., art. 150.

Enrolment of the Action

Once the defender has notified his *avoué's* appointment the two parties are face to face, but the court is not as yet seized of the dispute. This is effected by the pursuer's *avoué* who sends to the clerk of the court a document called a *placet*, which consists essentially of a copy of the pursuer's summons.[23] It is called a *placet* because it contains the words *Plaise au tribunal*, which may be construed as a request to the court to take cognisance of the facts placed before it. The clerk of the court inscribes details of the action upon a register and, in so doing, gives it a reference number.[24] In the margin of the register the president of the court indicates the name of the magistrate who is to supervise the due march of procedure.[25] Formerly the *placet* was returned to the pursuer's *avoué*, but it is now placed in the *dossier* or process which, since 1935, has been maintained by the clerk of court. The process includes a certified copy of the summons, the conclusions exchanged by the parties, a copy of the interlocutory judgments of the supervising magistrate, a copy of the minutes of any *enquête* ordered by the court, a copy of the report of any

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[21] C.Pr.Civ., arts. 150–165.

[22] C.Pr.Civ., art. 154 *bis*.

[23] C.Pr.Civ., art. 76, al. 2.

[24] C.Pr.Civ., art. 76, al. 1.

[25] C.Pr.Civ., art. 77.

expertise[26] so ordered, the written report on the case which the supervising magistrate is required to make, and copies of all judgments in the case.[27]

The Pleadings

In France the written pleadings of the parties are called *conclusions*. They should contain an outline, as precise and exact as possible, of the remedies which are sought and of the grounds of fact and law which are invoked to justify them. They serve to prevent surprise by informing each party of the other's pretensions. They serve to define the task of the court, whose decision must be neither *infra petita* nor *ultra petita*. Basically, therefore, French pleadings fulfil the same functions as their Scottish counterparts. It would be strange, however, if they were precisely similar in form and content. The Scots lawyer notices that primary and evidentiary facts are narrated together in the pleadings. While the Scottish pleader is concerned primarily to present a relevant case, the French pleader is concerned to present a convincing one. This appears to spring from the fact that in France the oral evidence is not led before the court itself but in an *enquête* before a commissioner who commits the evidence to writing and lays it before the court. French conclusions, therefore, not merely set out the essential facts which the pursuer must prove to win his case, but contain recitals of such evidence as tends to establish these facts, the primary and the evidentiary material being interwoven and presented in a manner calculated to persuade the court of the justice of its proponent's case. This is analogous to the methods adopted in Scotland prior to the adoption of jury trial in 1815,[28] and followed until recently in petition practice where it was considered desirable to " set out not merely relevant averments of the grounds of the action, but also such collateral facts as may lead the court to accept your contentions as those which they ought, in the exercise of their discretion, to take as sound." [29] French pleadings also, like the Scottish " written cases " of the eighteenth century, make no clear cut separation of fact and law. If a party is in possession of written evidence supporting his case, he analyses it to show that the facts bring the case within the ambit of a particular statute or principle of law. If he is not, he attempts to show that certain facts, which he believes to be true, which he sets out in a precise way, and which he offers to prove by *enquête*, are relevant. After the *enquête* the written report thereon is analysed in fresh conclusions just as any other items of written evidence. The discussion of the law in the *conclusions* is always summary. It is developed later by the advocate in his oral pleading.

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[26] See below.

[27] C.Pr.Civ., art. 79.

[28] "In the ordinary case the pleadings began with a narrative totally unlike our bald statements; it was almost always rhetorical and highly coloured, and any circumstance which was likely to incite sympathy was dragged in with an utter disregard of relevancy. The other side would probably ignore their adversaries' averments, and give a contradictory narrative with a completely different set of irrelevancies, and there was little or nothing done by way of adjustment to discover how far the parties were agreed upon the more important facts"—John A. Inglis, "Eighteenth-Century Pleading," 19 *Juridical Review*, p. 46. As a picture of the

It follows from the nature of French pleadings that it is not possible to state alternative and mutually inconsistent averments of fact. What is done, however, is first to try to show that the facts are such that they fall within a particular legal rule with such and such consequences and, secondly, to say that, alternatively, if they do not, they do at least fall positively within the terms of another legal rule from which other consequences are deduced or negatively outside its terms so that its consequences are inapplicable. Such a course, however, is regarded as demonstrating the weakness of the first thesis and practitioners hesitate before adopting it.

In modern Scottish procedure each party is restricted to a single pleading in which he subsequently incorporates his answers to his opponent's case and any additional averments which he finds necessary. The pursuer's condescendence is divided into numbered articles, thus enabling the

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position in eighteenth-century Scotland, this statement is, perhaps, itself rather highly coloured. It would certainly be an exaggeration to apply it directly to modern French pleadings; but it indicates what can happen when the pleadings are bad.

[29] Scott Dickson, " Pleading," 9 *Juridical Review*, pp. 28–29.

defender to answer succinctly the averments of fact contained in them, and allowing the preparation of a record combining both pleadings and in which each article of condescendence is followed by its answer. This is a relatively recent introduction. Prior to 1850 the Summons, which itself contained a statement of the facts, was followed by the Defence. "After the Defence came the Condescendence, the Answers, the Revised Condescendence and Revised Answers, and in many cases what is called Re-revised or Amended Revised papers; thus in almost all cases there are three, and in some four, statements of the case of each party." [30] This system of separate answers, replies and duplies, which lingered on here in contested petition practice until 1948,[31] closely resembles the methods adopted in France. There each party may submit any number of pleadings. The initial *conclusions* of the parties are not modified or adjusted. The pursuer replies to the *conclusions* of the defender by additional *conclusions* and the defender to these by additional *conclusions* of his own, and so on until the parties have exhausted the questions at issue. The pleadings are not divided into numbered articles [32] and no attempt is made to unite them into a record. The court has to sort out as best it can which points are contested and which are not contested and it is not always easy to get averment and counter-averment to meet. The Scots lawyer, who is acquainted both with the "record" system and the "separate paper" system, will have no doubt which system is the more convenient and efficient.

More interest attaches to the French rules regulating the exchange of pleadings. In an accusatory system of procedure it is vital to strike a balance between the need to prevent surprise and the need to prevent delaying tactics, and the practising solicitor in Scotland does not need to be reminded of the importance of the process of adjustment.

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[30] Joseph Murray, Introd. to Vol. 5, *Reports of Cases Tried in the Jury Court*, p. xxiv.

[31] Rules of Court, 1948, art. 214.

[32] But these are divided into a series of separate paragraphs always commencing with "Attendu que," which means that, while not numbered, they are "articulate."

In France, once the action has been enrolled, the pursuer's *avoué* calls upon the defender to lodge his defences within a period of fifteen days.[33] This is effected by a deed called an *avenir*, served by *huissier audiencier* on the defender's *avoué*. The pursuer's own *conclusions* must be served upon the defender and lodged in court within the same period. If either party fails to lodge his *conclusions* within the due period his adversary may serve another *avenir* upon him calling upon him to do so within a further period of fifteen days, failing which the court will be asked to grant decree in the pursuer's favour or to assoilzie the defender as the case may be.[34] A judgment so given by the court is a decree by default in the Scottish sense of the term. Special provision to prevent surprise was made by legislation passed in 1944. It is provided that pleadings have to be lodged in court and served upon the adversary at least ten days before the hearing. This period of ten days is reduced to five when the pleadings are in reply to pleadings served by the adversary between the fifteenth and the tenth days prior to the hearing. The court has a discretionary power to receive pleadings submitted later than the due dates but, when such pleadings are received, the other party is always allowed a period of five days to reply.[35] The 1944 legislation works reasonably well in practice and it is thought that similar rules might be adopted with advantage here.

The supervising magistrate

In this system of exchange of pleadings, as in the system of adjustment in Scotland, control over the due march of procedure is abandoned almost entirely to the parties themselves. This has certain disadvantages: in particular, it puts a premium on dilatoriness. This led Lord Cooper to suggest that " the time is ripe for a revision of the whole system of procedure by giving the court effective powers to take active control of the litigation once it has been brought into court.''[36] These disadvantages were also felt in France, where practitioners were familiar with a different and expeditious type of procedure in criminal affairs, the inquisitorial system. In 1935, therefore, it was enacted that a magistrate was to be nominated in each case to supervise procedure.[37] He was specially charged with the control of the exchange of pleadings.[38] In order to hasten the march of procedure he might convoke the *avoués* as often as he thought fit. He could order, either on his own initiative or on that of the parties, any inquiry or expert's investigation that might be necessary to elucidate the facts.[39] He might grant continuations where these were necessary. He was required to report cases where there had been default to the president of the court so that the court might dispose of them. Lastly, he was to give to the court a summary report of the nature of the action, the procedure to date, the facts, and the arguments of the parties.

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[33] C.Pr.Civ., art. 78.
[34] C.Pr.Civ., arts. 154 and 154 *bis*.
[35] C.Pr.Civ., art. 82 nouveau.

The institution of a supervising magistrate was welcomed by academic writers in France, but has not proved nearly so successful in practice as had been hoped.[40] The reason is not far to seek. The supervising magistrate was merely grafted on to a system of procedure which was, and remains, self-sufficient without him. A case can still move along the ordinary channels towards judicial decision without any prompting from the supervising magistrate. It is still the parties, and not the supervising judge, who require each other to submit their pleadings, to disclose documents, etc. This gave practitioners the opportunity, which they seized with both hands, to denature the reform. The supervising judges were reluctant to intervene on their own initiative[41] and the chief result of this reform has been an increase in formalities.

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[36] Address to the Society of Public Teachers of Law on September 18, 1953; published in the Society's Journal (New Series), Vol. II, p. 98.

[37] Decree-law of 30.10.1935.

[38] C.Pr.Civ., art. 80 nouveau.

[39] C.Pr.Civ., art. 81 nouveau.

[40] *Avoués* take the view that, far from hastening the march of procedure, the institution of the supervising magistrate has slowed it down in the average case by approximately six months.

[41] They are reluctant, for example, to order *enquêtes* on their own initiative because they would have to carry them out themselves.

Would any purpose be served by the institution of a supervising magistrate in Scottish practice? Lord Cooper's remark suggests that he had something of the kind in mind. It would seem, however, that the institution of a supervising magistrate is largely a function of a collegiate court. In Scotland the judges of first instance are very largely their own "supervising magistrates." The late Sheriff Dobie points out that the sheriff is the sole judge of the point of time at which the pleadings are held as adjusted: "The power of the court to fix peremptory diets, and make peremptory orders is enough to afford a remedy against purely dilatory tactics."[42] If the courts cannot secure the due march of procedure with their present extensive powers, it is difficult to see that the institution of a supervising magistrate would improve matters.

Interlocutory judgments

Much use is made of interlocutory judgments in French procedure, and such judgments fall nowadays within the competence of the supervising magistrate. A distinction is made between provisional judgments, preparatory judgments, and interlocutory judgments properly so called. Provisional judgments include awards of aliment *pendente lite* and measures to secure the preservation of evidence or property. Preparatory and interlocutory judgments proper are both concerned with measures to be adopted to assist the parties in the preparation of their cases and the court in elucidating the facts. The former are those which do not in any way indicate what the ultimate decision of the court will be, such as an order to produce documents relevant to the case. The latter do give some indication of what the court is thinking, as when proof of certain facts is allowed. But the interest of this distinction has largely disappeared. Formerly a preparatory judgment could not be appealed until the decision on the merits was given.

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[42] *Sheriff Court Practice*, p. 157.

Since 1942 that rule has been limited to appeals to the *Cour de Cassation*[43] and otherwise the principle obtains that all judgments can be appealed at any stage of the proceedings.[44] A major distinction exists between the effect of an interlocutory judgment proper in French law and an interlocutor allowing proof in Scots law. An allowance of proof in Scotland is a finding by the court that, if the facts averred are proved, they will justify the remedy which the pursuer seeks. In French law the principle is that *l'interlocutoire ne lie pas le juge*, a principle which finds special justification when the interlocutory judgment is that of a single judge and when the organ of final judgment is a collegiate body. While the French courts freely use their power to disallow proof of averments of particular facts which are not deemed to be material, they are less disposed than the Scottish courts to dismiss an action without any inquiry as to the facts on the ground that no relevant case has been laid.

The gathering of evidence

In modern Scottish procedure the facts are established by the oral adduction of evidence before the judge who is to decide the case. In a very real sense this is its climax. The climax of a French case is not an equivalent to the Scottish proof but a very near equivalent to the Scottish hearing upon evidence, the *audience des plaidoiries*. Before this hearing the evidence is assembled in a variety of ways, and, if not already written, is committed to writing. It is proposed to consider how this is done in a subsequent article. Here it will suffice to say that written evidence is admitted in France much more freely than in Scotland and that, where it is not available, the court will have recourse either to an *enquête* or to an *expertise*. The former is the examination of the witnesses by a judge commissioner, who commits their evidence to writing. The latter is an inquiry by an expert who examines the locus, productions, accounts, etc., and reports. It is analogous to the remit to a man of skill in Scottish practice, but much more frequent advantage is taken of the procedure in France. There are several subordinate procedures by which the court informs itself directly of the facts, but these are exceptional modes of proof. Characteristically, the court informs itself of the facts by evidence in writing, or evidence reduced to writing, which is laid before it.

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[43] The supreme civil court in France, which is rather a court of error than a court of appeal.

[44] Law of 23.5.1942.

Final adjustments

In Scottish procedure the record is closed before the proof, and thereafter amendment is permitted only with leave of the court and subject to conditions as to expenses. This closing of the pleadings is related to their function of indicating—by revealing the facts which each party intends to prove—what facts must be proved by either side. Although this is one of the uses of pleadings in France, it is only one of them, which is exhausted before the case is heard by the court. The pleadings also serve to persuade the court of the justice of each party's case, and it follows that additional pleadings are admitted freely after the evidence has been gathered and placed before the court. After the *enquête* or *expertise* each party submits fresh *conclusions* expounding his version of what facts have been established, pointing out and often quoting the items of evidence favourable to his case, demonstrating inconsistencies in the evidence relied upon by the adversary, and drawing such inferences of law as may appear to support his case. When these *conclusions* have been exchanged the supervising judge sends the *dossier* of the case to the president of the court.[45] The case is then enrolled for the *audience des plaidoiries*.

The hearing on evidence

The *audience des plaidoiries* is essentially a discussion of the facts and law before the whole court which is to decide the case, normally a court of three judges. The hearing is usually in public, but the court may sit in private in certain cases, notably those where a public discussion of the facts would give rise to scandal.[46] The proceedings commence with a reading of the parties' *conclusions*. This is largely a theoretical process in the busier *tribunaux civils*, although in the *cours d'appel*, even the busiest, the *conclusions* are read. Then the supervising magistrate—who is a member of the court—reads his report.[47] Although the omission of the report would nullify the proceedings, it is the practice in the busier tribunals to lay the written report before the court and its reading becomes a formality of a few mumbled words.

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[45] C.Pr.Civ., art. 81.

The oral pleadings follow. The parties may plead themselves with the assistance of their *avoués*; but the court has a discretionary power to refuse to allow them to do so,[48] and it is customary for the pleadings to be conducted by advocates. The advocate for the pursuer is heard first, then the advocate for the defender. If the latter raises any points which the pursuer's advocate has not already dealt with, the court may permit the pursuer's advocate to reply. In well-conducted proceedings, however, it is unusual to hear more than one speech for each party. The *audience des plaidoiries* is in no sense an oral debate or argument between the advocates concerned. Still less is it a debate in which the court will intervene. It consists essentially of speeches in which each advocate endeavours to convince the court of the justice of his client's case. The French advocate appears to identify himself with his client to a much greater extent than his Scottish counterparts pleading in the Court of Session and Sheriff Courts. This is due partly to the fact that the parties are usually the personal clients of the advocates and partly to the fact that the object of the oral pleadings is to convince. The advocate's speech tends to follow one or other of a number of similar patterns. The advocate for the pursuer may commence with an introduction in which he outlines the object of his client's case. He may continue with a narration of the procedure to date, a discussion of his client's version of the facts and of the evidence supporting it, and an examination of the defender's version of the facts. A consideration of the legal aspects of the case may follow. The advocate will develop the summary legal arguments which are contained in the *avoué's conclusions*. He will cite the cases which are favourable to his thesis and will endeavour to distinguish those which are not. He must anticipate his opponent's arguments, since usually he will have no opportunity to reply to them. It may be thought that this is not such a satisfactory method of elucidating the law as the English (for, even though it is now adopted in Scotland, it is characteristically English) method of oral argument; but it will be recalled that some time before the *audience des plaidoiries* each side is informed of the legal basis of the case he has to meet. This permits of a very different type of legal discussion which is not necessarily less satisfactory than our own. The speech often ends with a peroration in which the advocate re-emphasises the essential features of his client's case. The advocate's speech will be carefully prepared and based upon extensive notes. When the advocate is inexperienced or diffident, the notes may be rather more than headings to refresh his memory and may become, in fact, a written version of his speech. The notes are written or typed on one side of numerous folded pieces of paper called *cotes*. Usually, only a relatively small subdivision of the notes is placed on each *cote*. Within the fold of each *cote* the advocate will place the documentary evidence upon which he relies to substantiate that part of his case. This applies to the legal arguments as well as to the exposition of the facts. When citing decisions or textbooks the advocate will not content himself with leaving the judges to follow up the reference but, whenever possible, will enclose within the *cotes* a copy of the relevant parts of the decision or of the relevant passages from the book. At the end of the *audience des plaidoiries* each advocate will hand over his bundle of *cotes* or *dossier* to the court, which in this way obtains written versions of the advocates' pleadings together with all the documents and productions in the case. No reference to this written version of the advocates' pleadings will be found in the Code or even in the textbooks, but it is clearly of great importance. An advocate will occasionally (although this is rare) prepare two versions of his speech, a version designed for oral presentation which is the basis of an " extempore " speech before the court and a version more suited to be read which appears on the *cotes* which are handed in at the end of the proceedings. Two observations may be made about this procedure. The first is that the *cotes* tend to duplicate and supersede the official written conclusions of the *avoués* and the second that they tend to duplicate and supersede the oral pleadings of the advocates themselves. The court has less incentive to pay close attention to the oral pleadings when it knows that it will be furnished later with a written version of them.

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[46] C.Pr.Civ., art. 87.

[47] C.Pr.Civ., art. 82.

[48] C.Pr.Civ., art. 85.

When the advocates have been heard the president of the court pronounces the closure of the debate. The *ministère public* has now the right to give the court the benefit of his views. He rarely intervenes except in those cases which involve a question of public importance and usually contents himself with saying that he leaves the decision to the wisdom and sense of justice of the court. If he does speak the parties cannot reply orally to his arguments, but merely hand in written notes.[49] If the court considers that these notes raise new questions of importance, it may order a fresh debate.[50]

The case is now in the hands of the court for judgment.

Concluding observations

This article has dealt with certain aspects only of French civil procedure and these in a most summary way. Any wide generalisations as to the effectiveness of the system would be out of place. French practitioners are fully aware of such defects as there are in their system and, to a much greater extent than their colleagues in this country, take an interest in proposals for its amelioration. The history of recent French legislation shows that a real effort has been made to effect improvements. The Scottish observer, however, may be permitted to question whether the logic of the basic changes has always been projected sufficiently into the realm of detailed rules. One would have thought, for example, that with the institution of the supervising magistrate the primary responsibility for requiring the parties to submit pleadings would have been transferred from the parties themselves to that magistrate. In Scottish procedure the defences are ordered by the court. There is no reason—other than the historical one that each party is fictionally confined to one pleading—why the courts should not order adjustments to the condescendence and answers to be lodged by each party within fixed periods on pain of sanctions. In French procedure the institution of the supervising magistrate should permit of a similar reform. Of its desirability there can be little question, since even more time is lost during the exchange of pleadings in France than during the process of adjustment in Scotland.

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[49] Decree of 30.3.1808, art. 87.

[50] Laborde-Lacoste, *supra*, p. 202.

It would be most misleading, however, to lay too much stress upon the defects of the French system. It has many counterbalancing qualities. The most obvious of these is its simplicity. There is none of the labyrinthine complexity which is the principal feature of English procedure. It is true that in the interests of clarity of exposition the writer has refrained from referring to certain subsidiary procedures, notably that by which the president of the court sits as *juge des référés*[51] in urgent matters. Essentially, however, the system is simple. In its virtually complete absence of special forms of action it goes even further than Scots law. Yet this simplicity is allied to a certain flexibility. The various procedural keys and stops can be manipulated by the *avoué* and advocate to suit a great variety of facts and circumstances. The most important thing is that the system works, that the procedures here described do provide an adequate framework into which can be set the delicate and important machinery for the ascertainment of the facts.

A. E. ANTON.

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[51] This procedure is itself exceptionally simple and informal.

CASES AND COMMENT

1. SCOTTISH CASES

PERSONAL INJURIES—action by wife against husband.

There was a time when the law maintained a fiction of the legal unity of husband and wife. For eighty years now this has been undergoing piecemeal demolition and in the result there survive anomalies and inconsistencies, and, some may feel, even injustices in this part of the law. An interesting issue of this kind arose in *Morrison* v. *Morrison*, 1956 S.L.T.(Sh.Ct.) 42, where the wife sued the husband for damages arising out of a motor accident which took place before their marriage. Her claim of damages had also been intimated prior to the marriage. In such circumstances English law allows the wife her action: *Curtis* v. *Wilcox* [1948] 2 K.B. 474, and there is Outer House authority that a wife may sue her husband on a claim arising *ex contractu*; why not, then, it was argued, if the claim arose *ex delicto*? The learned sheriff-substitute dismissed the action as incompetent mainly on the ground, not of any fictional unity of husband and wife, for that fiction can no longer be supported, but on the ground that it is against public policy for a wife to sue her husband on the ground of *quasi-delict*: *Harper* v. *Harper*, 1929 S.C. 220; 1929 S.L.T. 187. This is true enough, quite apart from authority, but it is hard to see on what basis litigation between spouses arising *ex delicto* is unseemly but litigation arising *ex contractu* is unobjectionable. Moreover, in *Harper* the delict was not ante-nuptial. A subsidiary ground of decision was that a claim of damages, even one intimated to the defender, was not an incorporeal moveable asset of the wife's estate vested in her at the date of her marriage which she could, under the Married Women's Property (Scotland) Act, 1920, sue to vindicate as if she had been unmarried. For this the sheriff-substitute relied on the doubts cast by the House of Lords in *Stewart's Exrx.*, 1943 S.C.(H.L.) 19; 1944 S.L.T. 13, on the view in *Leigh's Exrx.*, 1913 S.C. 838; 1913, 1 S.L.T. 373, that an intimated claim transmitted as personal estate. What, then, is the juridical nature of an intimated claim of damages? Is it an incorporeal asset or a purely personal claim barred by death or marriage? The Court of Appeal in England held in *Curtis* v. *Wilcox*, *supra*, that the wife's claim was a "thing in action" and part of her separate property which could be reduced to possession by legal action; but Lord Macmillan, in *Stewart's Exrx.*, *supra*, was quite definite that in Scotland a right of action was in no sense an asset of a man's patrimonial estate, a proposition which he vouched by Vinnius. But why not? And, even assuming *Leigh's Exrx.* is wrongly decided, an executor may carry on an action raised by a now deceased person for damages in respect of those injuries: *Darling* v. *Gray* (1892) 19 R.(H.L.) 31. What juridical transformation has been effected by the raising of an action as distinct from the mere intimation of the claim? Moreover, the claim is assignable *inter vivos*: *Traill* v. *A/S Dalbeattie* (1904) 6 F. 798. That suggests it is of a proprietary nature. The learned sheriff-substitute's judgment is sound in so far as based on authorities which justify his decision, but the fundamental basis of some of these authorities seems to require examination, and a tag from Vinnius does not necessarily settle the controversy. If Gloag and Henderson are right in submitting (5th ed., p. 453) that claims *ex delicto* are incorporeal moveable property, this part of the foundation for the judgment seems to crumble. Perhaps the only conclusion that can be drawn is that there are still inconsistencies and illogicalities in the law of husband and wife. The only real justification for this decision is that litigation between husband and wife is highly undesirable and ill-calculated to promote happy matrimonial relations. The legal issues and more general problems, however, require re-examination by a higher court since they clearly cannot be reconciled on the present basis, and it is to be hoped that practitioners will not take this case as finally settling the law.

D. M. W.

MASTER AND SERVANT—industrial disease.

The frequency with which claimants for reparation found their claims on breach of statutory duty renders the decision in *Wardlaw* v. *Bonnington Castings, Ltd.*, 1956 S.L.T. 135 of considerable general importance. The House of Lords there decided that in such a case the onus of proof on the pursuer was the same as that in actions at common law: he had to prove the breach of duty, and that the injury was caused by the breach, on the balance of probabilities, as is normal in a civil action. This decision checks the tendency noticeable in a number of English decisions to raise a quasi-presumption of causation if the breach were proved and an accident of the kind which the regulation was designed to obviate had happened. The decision is to be welcomed as restoring the law to reasonable lines and overruling the dictum of Scott L.J. in *Vyner* v. *Waldenburg Bros.* [1946] 1 K.B. 50, which definitely shifted the onus on to the employer to disprove causation. Statute may, of course, impose such a liability but the House have done well to stress that in the absence of an indication to that effect the ordinary civil onus of proof applies.

D. M. W.

VALUATION—salmon fishings—kindly tenants.

The Valuation Appeal Court made an interesting excursion into the delectable paths of legal history in *Royal Four Towns Fishing Association* v. *Assessor for Dumfriesshire*, 1956 S.L.T. 217, when they discussed the rights of fishing enjoyed by the King's kindly tenants of the four towns of Lochmaben, whose original tenure is ascribed by Bell and Ross to villeinage, holding their lands solely by entry in the King's steward's rental book or by a copy of the entry therein. They had had from time immemorial the right of fishing for salmon in the Annan, and an association was formed to administer and manage the fishings and obtained revenue therefrom. Modernity, unfortunately, stepped in at this point in the shape of the assessor, whose claim to value the fishings was eventually sustained. The decision, of course, does not in any way affect the title of the kindly tenants, which still remains as an interesting survival from pre-Reformation times. It is pleasant to find these survivals cropping up even in the arid wastes of valuation.

D. M. W.

JURISDICTION—polygamous marriage.

Muhammed v. *Suna*, 1956 S.L.T. 175 has now given us a decision that the Scottish courts will not entertain an action for the dissolution of a potentially polygamous marriage, even though that potentiality was never realised in actuality. The decision is in line with accepted English authority and with the views of the text-writers, and, what is more important, it is consistent with the view of marriage accepted in this country, and underlying all the consistorial law, that marriage is a strictly monogamous union *de jure* as well as *de facto*.

D. M. W.

ROAD TRAFFIC—construction and use of vehicles.

Clark v. *Hunter*, 1956 S.L.T. 188 was a stated case by way of appeal from a conviction for " causing or permitting " an employee to drive a lorry with a defective brake and other defects. In the first place the court held that " cause it to be used " did not impliedly import any qualification of knowledge of the defect and the consequent contravention of the regulation: such an implication would go far to defeat the purpose of the regulation by confining it to deliberate cases. Secondly, the court held that " causing " and " permitting " were different things, and permission necessarily involved knowledge of the fact of the contravention of the regulation: the convictions accordingly were not sought to be supported so far as resting on permission. Lord Sorn, however, dissented in respect of the charge, holding that " cause to be used . . . in contravention " involved the notion of mandate, not merely to use, but to use in contravention. Even so, there are clear social grounds of necessity for holding that the quasi-mandate figured may be given by omission to check and rectify the defect. The case is quite instructive on the accurate use of terminology and the connotations of the various terms employed.

D. M. W.

" WITHOUT REASONABLE CAUSE."

The recent case of *Richardson* v. *Richardson*, 1956 S.L.T. 226, affords ample illustration of the fact that Scots law draws no hard dividing line between law and equity as in other systems, and that equity continues to play an important part in the development of the law to meet changing social and economic conditions.

The foundation of divorce for desertion now rests on section 1 (1) (*a*) of the Divorce (Scotland) Act, 1938, but as this provision involved no change in principle from the previous law, prior judicial interpretation of the required elements remains relevant (*Wilkinson* v. *Wilkinson*, 1943 S.C.(H.L.) 61; 1944 S.L.T. 2).

The pursuer must *inter alia* establish that the defender's desertion was " without reasonable cause," and much comment on the meaning of this phrase was made by the Second Division of the Court of Session when the case of *Richardson* was before them.

It is settled law that nothing less will afford reasonable cause for non-adherence than that which would be sufficient as a defence to an action of adherence. Under the older law " reasonable cause " could consist only in what amounted to a substantive ground of divorce, *i.e.*, adultery, *saevitia*, and now sodomy. Against this falls to be measured a trend of judicial comment and decision purporting that the conduct of the pursuer towards the defender may be such that the court could not reasonably ordain adherence (even though the facts might not be sufficient to found an action for separation at the instance of the defender), and that something less than a substantive ground of divorce will accordingly suffice to establish reasonable cause on the part of the defender for refusal to adhere.

While the controversy was no new one even in 1895, the advocates of the " looser criterion " have derived much comfort from the opinion of Lord Herschell L.C. in *Mackenzie* v. *Mackenzie*, 22 R.(H.L.) 32; 3 S.L.T. 11. The Lord Chancellor said: " It seems to me open to question whether the courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as *saevitia* or cruelty; can he when his own misconduct has led his wife to separate herself from him come into court, and avowing his misdeeds, insist that it is bound to grant him a decree of adherence? " It is important to note that there is no suggestion that injury to health need be present.

In line with the views of Lord Herschell are the opinion of Lord Keith dissenting in *Borland*, 1947 S.C. 432; 1947 S.L.T. 242, where he indicated approval of Lord Robertson's decision in *Hamilton* (*infra*), and the comments of Lord Fraser in his work *Husband and Wife*, Vol. 2, p. 873. In *Lennie* v. *Lennie*, 1950

S.C.(H.L.) 1; 1950 S.L.T. 22, Lords Merriman and Normand expressly reserved their opinions on the point.

This modern view of " reasonable cause " is, as has been said, contrary to the older law, and flies directly in the face of the weighty opinions of Lord President Inglis in *Chalmers* (1868) 6 M. 547, Lord Rutherford Clark in *Mackenzie* (*supra*), and Lord Dundas in *McEwan* v. *McEwan*, 1908 S.C. 1263; 16 S.L.T. 342. That the older view has survived to more recent times is implied in the dictum of Lord Moncrieff in *McLachlan*, 1945 S.C. 382; 1945 S.L.T. 339, that a decree of adherence is " the exact obverse of a decree of separation."

Must there, then, be a substantive ground for divorce, or will something less suffice? Actual judicial decision in support of the wider connotation of " reasonable cause " for non-adherence is scanty and limited in nature. It consists in three Outer House decisions.

The first of these is the case of *Hastings* v. *Hastings*, 1941 S.L.T. 323, in which Lord Robertson took the bold course of allowing himself to be guided by the opinion of Lord Herschell. He there held that a husband who had been tricked into marriage by the false representation that he was the father of the pursuer's child *in utero*, and who refused to adhere upon discovery of the true state of affairs, had reasonable cause for his non-adherence. Divorce was accordingly refused. Lord Robertson stated: " Assuming (but not deciding) that the facts of the present case would not have grounded an action of separation at the instance of the defender against the pursuer, they are yet such as could have been successfully pleaded by him against an action of adherence. . . . If so, I think it follows that he is not in desertion of her because there is reasonable cause for his non-adherence." (It is interesting to compare this decision with that in *Lang* v. *Lang*, 1921 S.C. 44; 1920 2 S.L.T. 353, where on similar facts the husband was refused a declarator of nullity of marriage.)

Lord Keith took a similar view in the unreported case of *Pollock* (1946), where he refused decree of divorce to a husband on the ground that, though misconduct was not proved, his association with another woman was of such a familiar nature as to justify his wife in not adhering to him.

Again, in *Hamilton* v. *Hamilton*, 1953 S.C. 383; 1953 S.L.T. 285, Lord Guthrie took the wider view " that the court should consider each case on its merits and decide whether the particular circumstances of the case constitute what would be regarded by a reasonable man as a justification of withdrawal from conjugal cohabitation." He added, however, "As the interests of society require the preservation of marriage, it is obvious that only 'grave and weighty' causes could be held to be reasonable." In *Hamilton's* case, the wife had confessed adultery to her husband, and though this was not proved and was subsequently denied by her, it was held that he had reasonable cause for non-adherence.

It may be noted that all three cases contain a sexual element though *Pollock* is perhaps arguable. At any rate, no cases have arisen involving the type of conduct contemplated by Lord Herschell in his opinion quoted above, conduct which Lord Justice-Clerk Thomson in the case of *Richardson* calls "*quasi-saevitia.*" (Away from the context of divorce, however, it is interesting to note the recent Sheriff Court case of *Hutcheson* (1953) 69 Sh.Ct.Rep. 228, in which there was a finding that a wife's conduct not amounting to cruelty was such as to render continuance of married life impossible, and afforded the husband a good defence to an action for adherence at her instance.)

Richardson might have been such a case, though here again the conduct which the defender sought to establish as reasonable cause was her husband's association with a member of the opposite sex. The lady concerned, however, was one of his fellow-directors and it was admitted that there was nothing amatory or sexual in the relationship. Over a number of years the husband persisted in bringing this lady into their social orbit despite his wife's protests and to the injury of her health.

In the Outer House Lord Cameron reviewed the authorities in point, and proceeded on the view that the wider connotation of "reasonable cause" was now established law. Adopting Lord Guthrie's test in *Hamilton* (*supra*), he held that the conduct complained of was sufficiently grave and weighty as to justify the wife's non-adherence, though he was not prepared to affirm that it would have amounted to full *saevitia.*

Mr. Richardson appealed to the Inner House, and as it turned out, the Second Division, differing from Lord Cameron in their interpretation of the facts, repelled the defender's plea of reasonable cause, and granted decree of divorce. Their Lordships felt that the effect of the pursuer's conduct was unduly exaggerated by a wholly unjustifiable obsession on the part of the defender.

In reaching this conclusion, Lords Mackintosh and Blades did not find it necessary to decide whether the looser of the two criteria had been adopted into the law. The Lord Justice-Clerk—Lord Thomson—and Lord Patrick, however, were satisfied that the looser criterion did now in fact apply, though it did not require to be invoked in the present case. At the same time, from the very nature of the subject, it was obvious that anything approaching a precise definition of " reasonable cause " was impossible.

In the course of a long and careful judgment Lord Thomson said : " I do not think it possible in 1956 to maintain that nothing but proven adultery, cruelty or sodomy will be enough. There have been too many judicial indications the other way. Nor can one shut one's eyes to modern social tendencies. The modern woman is not expected to put up with some forms of treatment which her unemancipated and possibly tougher mother and grandmother had no option but to endure. On the other hand . . . any modification of the old rule must be carefully weighed. . . . . The circumstances disclosed must at least be such as to make it unconscionable to decree adherence. There must be something that would shock the ordinary right-minded person. This does not mean that in the ordinary case, where adultery or cruelty or sodomy is in issue, the burden of proof is to be relaxed and a verdict of not proven converted into a verdict of guilty. . . . Any permitted extension to include kinds of intolerable conduct not falling strictly into one or other of these categories ought, whatever and however varied its components, to be *of broadly comparable gravity in its disintegrative effect on the marriage relationship*." (The italics are the writer's.)

Again, Lord Patrick states that the conduct to excuse non-adherence must be " something grave and weighty and such that it would shock the conscience of reasonable men to require the offended spouse to live with the offender again."

Lord Mackintosh, while refraining from choice between the two criteria, referred to a dictum of Lord Asquith in the English case of *Buchler* [1947] P. 25, that the conduct must " exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other, for better, for worse. The ordinary wear and tear of conjugal life does not, in itself, suffice."

Thus, it is submitted, the controversy as to what constitutes "reasonable cause" is not yet really settled. At worst, *Richardson* is a negative confirmation of the modern view. At best it is a strong indication of the line the Court of Session will take in any future cases. It remains for Mr. and Mrs. X to be so obliging as to provide the court with a set of circumstances within the compass contemplated by Lord Herschell.

K. F.

2. ENGLISH CASES

CHILD PLAYING IN PUBLIC RECREATION GROUND —whether invitee or licensee.

A distinction between the law of Scotland and England is emphasised by the decision of the Court of Appeal in *Dyer* v. *Ilfracombe Urban District Council* [1956] 1 W.L.R. 218, which is in direct conflict to the Scottish decision of *Plank* v. *Magistrates of Stirling*, 1956 S.L.T. 83. Actually both cases were decided in November, 1955, and neither decision was available to the opposing court. But it is unlikely, in any event, that the Scottish courts would have followed *Dyer*, which according to the reasoning in *Plank* would here be regarded as founded upon a line of English authority influenced originally by an erroneous view of *Taylor* v. *Glasgow Corporation*, 1922 S.C.(H.L.) 1; 1921, 2 S.L.T. 254.

In *Dyer* a boy aged four and a half fell from the 12 foot high platform of a chute in a public recreation ground when he climbed through the double line of rails which surrounded the platform. The Court of Appeal held that the child was a licensee and that the chute being properly constructed, installed and maintained, and there being no concealed trap or danger which would not be obvious to a boy of the plaintiff's age, the defendants could not be regarded as having failed to fulfil their duty as licensors.

In *Plank* the facts were similar, except that part of the guard round the platform consisting of upright palings was missing, leaving a vertical gap, whereas in *Dyer* the gap was a horizontal one always existing between the rails. As the evidence in the latter case was directed to concealed danger or trap it is not so certain that the child, if regarded as an invitee, would have been awarded damages on the ground that the gap between the rails was an unusual danger. However, *Dyer* still remains of interest as emphasising that English law regards a child in these circumstances as a licensee. It is to be hoped that if the House of Lords is ever called upon to resolve the conflict it will favour the Scottish view. As the Lord Justice-Clerk observed in *Plank* (*supra*, p. 86), the real difficulty of the doctrine of categories, which has never been welcomed in Scotland, is that the category of invitee is limited and hard for claimants to aver, and that relegation of many claimants to the status of licensee has tended to operate hardly. Accordingly, an extension rather than a restriction of this category is to be preferred.

W. A. E.

HUSBAND AND WIFE—
cruelty—intention to injure.

Waters v. *Waters* [1956] 2 W.L.R. 661 is important for deciding that a man may have an intention to do something though such intention conflicts with his desire; and that a husband may be guilty of cruelty if his intention was to act as he did although he may have hoped or desired that his acts would not produce the effect they did.

In *Waters* a wife's case was founded *inter alia* on her husband's cruelty, and her complaint before a court of summary jurisdiction was of extreme boorishness on the part of the husband, of unbearable taciturnity, of a deliberate refusal to co-operate over the running of the home and finance, and of personal uncleanliness of a very marked character persisted in, despite the wife's protests, to the extent that it became, in effect, nauseating. There was complete indifference to her health, which was affected, and to her protests against the adverse effect upon her of his conduct. The justices found *inter alia* that the parties were unsuited to each other, that the husband had had no intention of being cruel, that his silence was due to his natural disposition, and that the deterioration in the wife's health had not been due to wilful misconduct on his part. It was held, however, in the Probate Division, that the justices had misdirected themselves, for it was not sufficient to dismiss the matter by saying that the husband had had no intention of being cruel. In so holding Lord Merriman expressly adopted the observations of Lord Normand in *Jamieson* v. *Jamieson* [1952] A.C. 525, 550; 1952 S.C.(H.L.) 44; 1952 S.L.T. 257. Lord Merriman said:

"If a reasonable man (if I may paraphrase) would know—and this husband did know—that continuance in the course of conduct complained of would have an injurious effect on his wife's health, what more is necessary? In what way does that differ from the test which Lord Normand adopted in *Jamieson* v. *Jamieson*, that the spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim?"

English law, however, does not follow Scots law in holding (as was held in *M'Lachlan* v. *M'Lachlan*, 1945 S.C. 382; 1945 S.L.T. 339) that the defendant need not know the nature and quality of his acts, or that he can still be guilty of cruelty although he was insane at the time the acts complained of were committed. In view, however, of the inference to be drawn from Lord Normand's observations, *supra*, it is thought that *M'Lachlan* might be overruled if a suitable case was ever taken to the House of Lords.

W. A. E.

STATUS OF CIVIL SERVANT—whether contract of service—action for loss of services.

Inland Revenue Commissioners v. *Hambrook* [1956] 2 W.L.R. 919 may have repercussions in constitutional law which were not perhaps intended when Lord Goddard C.J. decided therein not to extend the scope of the action for loss of services.

In this case a tax officer, who was an established civil servant, suffered injuries while riding a motor-cycle, in consequence of which he was off duty for almost a year, and during which time he received sick pay from the Inland Revenue Commissioners. The accident was caused by his collision with a motor-vehicle driven by the defendant whom the commissioners then proceeded to sue for loss of services. They did so on behalf of the Crown in terms of section 17 (2) of the Crown Proceedings Act, 1947. It was admitted that the defendant was two-thirds to blame for the accident.

Lord Goddard held that an established civil servant was not a servant of the Crown, and that the action would accordingly not lie. He was a public officer appointed to his office and remunerated by moneys provided by Parliament, so that his employment depended not on contract but on appointment. His Lordship conceded, however, that there might be exceptional cases, as, for instance, engagements for a definite period, where there might be a contractual element in or collateral to a civil servant's employment. Lord Goddard also rejected the argument that *de facto* service was sufficient although there might be no proper contract of service. And he was of the opinion that even if he was wrong in this view, and there was a master and servant relationship of some description, it still was not of the type necessary to enable actions for loss of services to be brought by the master. One difference, for instance, was that the contract, if there was one, gave the servant no remedy against the employer in the event of its breach. Perhaps a clearer ground for refusing the plaintiffs' claim was that no relevant averments of damage had been made, as it appeared that the sick pay paid to the tax officer was only a voluntary payment and did not, therefore, constitute damage in law.

Lord Goddard also pointed to an interesting anomaly. If the plaintiffs had been entitled, as they contended, to recover the whole of the payments as damages, the defendant would have been liable for their total amount without reduction of the one-third portion representing the tax officer's share of the blame. His Lordship did not require to pursue this interesting point any further. It would seem, however, that the defendant could not then recover a contribution from the tax officer in terms of section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, because the latter would not have been liable if sued by the Crown. He was off duty at the time of the accident and, therefore, presumably not in breach of any contractual obligation to drive with reasonable care. But if he had been on duty, *quid juris?* Could the Crown have then sued him for an implied breach of his contract of service, and was there a sufficient contract of service for this limited purpose? The case bristles with possibilities and it is thought we have not heard the last of it. Certainly, the obsolescent action for loss of services, deriving as it does from the status of villeinage, should not be extended, but, on the other hand, it should not be curtailed by confusing the true legal status of civil servants.

SUNDAY OBSERVANCE ACT, 1780—interpretation—ejusdem generis rule.

In *Culley and Others* v. *Harrison* [1956] 2 Q.B. 71 there was a successful prosecution under section 1 of the Sunday Observance Act, 1780, of certain officials who ran a motor-cycle race on a Sunday in a roped-off portion of a public park to which the public were admitted on payment. Section 1 of the Sunday Observance Act provides that " . . . any house, room or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room or place shall . . . and the person managing or conducting such entertainment or amusement on the Lord's Day . . ." shall by section 1 (3) of the Common Informers Act, 1951, be liable on summary conviction to a fine.

It was held by the Divisional Court that the mischief aimed at by the Sunday Observance Act, 1780, was public entertainment for money on Sunday. The words " house, room " in section 1 did not establish a genus and therefore the word " place " was not restricted in its meaning by reference to the preceding words, but, on the true construction of the section, meant any place set aside for public entertainment or amusement to which the public were admitted on Sunday by the payment of money.

The English courts do not, of course, have power to declare statutes to have fallen into desuetude like the Scots courts which have power to invalidate pre-1707 Scottish statutes and, in particular, certain pre-1707 statutes to prevent profanation of the Sabbath. But here, in *Culley*, we have not only up-to-date enforcement but also an extension of the statute's application to cover open-air entertainments. One wonders why this case has not received greater publicity, or why some Sabbatarians have not taken steps to have the polo ground at Cowdray Park on Sunday declared a disorderly house!

W. A. E.

3. PRIVY COUNCIL CASES

LANDLORD AND TENANT—“ Entirely new building.”

In *Kai Nam (A Firm)* v. *Ma Kam Chan* ([1956] A.C. 358) consolidated appeals were brought from six orders of the Full Court of the Supreme Court of Hong Kong by which that court allowed six appeals against an order of the District Court of Hong Kong which had rejected the present respondent's claim for possession of certain premises and dismissed his actions. The appellants were respectively tenants of six premises in the Colony of Hong Kong, of which premises the respondent was landlord. Before the Pacific war the site of the premises was occupied by a four-storey building intended for residential purposes. During the war it suffered damage amounting to almost complete demolition. After the passing of the Landlord and Tenant Ordinance (Hong Kong), No. 25 of 1947, the then owner obtained permission from the Public Works Department to erect temporary one-storey premises for use as shops. In the new construction almost the whole of the old foundation was retained, and also the lower part of the old walls to an average height of three bricks above ground level. The old drains were used, the old concrete flooring was largely retained, and also most of the old lavatories. The new walls were not as thick as the old, being only one brick thick. The plan of the floor was the same as the old ground floor though there was a slight increase of internal area owing to the thinner walls.

In October, 1953, the respondent gave each appellant notice terminating his contractual monthly tenancy then subsisting, and in December, 1953, began proceedings claiming possession and mesne profits from December 1, 1953. The appellants relied on the Landlord and Tenant Ordinance of 1947. The respondent contended that each of the premises was excluded from its operation as being “ an entirely new building ” within the meaning of section 3 (1) (*a*). The appellants argued that it was not open to the respondent to advance that contention since he was estopped from doing so by serving notices of increase of rent under the ordinance on which the appellants had acted. The District Judge rejected that argument; but he also rejected the respondent's contention that each of the buildings was “ an entirely new building.” He accordingly dismissed each of the actions. The Supreme Court allowed an appeal from that decision, holding that each of the buildings was "an entirely new building" within the meaning of section 3 (1) (*a*). By that section: "This ordinance shall not apply to—(*a*) any entirely new building in respect of which the written permit of the building authority to occupy the same shall have been granted under the provisions of section 137 of the Buildings Ordinance after August 16, 1945." An occupation certificate was issued in respect of the new structure on October 7, 1954. The Landlord and Tenant Ordinance contained no definition of "building," or of "new building" or of "entirely new building." It contained, however, more than one reference to the Buildings Ordinance, 1935, section 2 of which stated what the terms "building" and "new building" included.

The Board held that the respondent was not estopped by having served notices of increase of rent purporting to have been made under the ordinance, and having received such rent. It was sufficient to observe that if the documents relied on could be regarded as containing representations, such representations were representations of law, not of fact, and could not found an estoppel. (See *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols* [1949] 1 K.B. 35.) On the more difficult question whether the premises could properly be held to be entirely new buildings within the meaning of section 3 (1) (*a*) of the Landlord and Tenant Ordinance, the Board agreed with the Supreme Court of Hong Kong that the definition of "building" in section 2 of the Buildings Ordinance was in such wide terms that it was not of any assistance in the solution of the problem. They also agreed that, although an "entirely new building" for the purpose of the Landlord and Tenant Ordinance must necessarily fall within the class of buildings which the Buildings Ordinance regarded as a new building, it was obvious from the definition of "new building" in the Buildings Ordinance that every new building within that definition was not necessarily an entirely new building for the purposes of the Landlord and Tenant Ordinance. The word "entirely" was probably included in section 3 (1) (*a*) of that ordinance to make it quite clear that the definition of "new building" in the Buildings Ordinance did not apply. The meaning of the phrase "entirely new building" must be ascertained from the provisions of the Landlord and Tenant Ordinance. The Board thought that the District Judge laid too much stress on the word "entirely," and paid insufficient attention to the words " new building," and to the distinction between a building and the materials of which it was composed. They agreed with what one of the judges in the Supreme Court said: " Where the damage has been so extensive that repair is impossible, when there is nothing left which could possibly be called a building, then surely the existence of that building as such is terminated," and that " a building replacing it would be an entirely new building even though it was built on the same foundations and had the same floor " as the old one. The words " entirely new " in section 3 (1) (*a*) were used in relation to the building and not to the materials of which it was composed, and the correct test to be applied was whether the old building was so far beyond repair that it could no longer be said to exist as a building. The structures which the appellants occupied were entirely new buildings within the meaning of section 3 (1) (*a*) of the Landlord and Tenant Ordinance, 1947, and the appeal would accordingly be dismissed.

"CHARGEABLE INCOME "—Discretionary statutory deduction.

Comptroller of Income Tax v. *Harrisons and Crosfield (Malaya), Ltd.* [1956] A.C. 459 was an appeal from a judgment of the Court of Appeal of the Supreme Court of Malaya dismissing the present appellant's appeal from a judgment of the High Court whereby the Comptroller's appeal from a decision of the Income Tax Board of Review was dismissed and the determination of the board affirmed. The Comptroller assessed the respondent company to income tax for the year of assessment 1951 under the Federation of Malaya Income Tax Ordinance, 1947, as amended. The appeal related to the rate of income tax to be charged in respect of a part of the income of the company which was distributed by way of dividend to its shareholders in November, 1950. The company's trading year ended on June 30, 1950. By section 39 of the Ordinance of 1947, as amended up to and including the year 1951: " . . . there shall be levied and paid for each year of assessment upon the chargeable income of—(*a*) every company, tax at the rate of 30 per centum on every dollar of the chargeable income thereof: . . . Provided that where any company proves to the satisfaction of the Comptroller that any dividends have been paid out of such chargeable income, . . . an amount equal to such dividends . . . may be charged at a lower rate or not charged with any tax as the Comptroller shall determine."

From the dividend declared in November, 1950, in respect of the profits for the trading year which ended on June 30, 1950, the company deducted income tax at the rate of 20 per cent., the rate payable on company profits for the assessment year then current. Those profits were subject to assessment to income tax in the year of assessment 1951, and from January 1, 1951, section 39 (*a*) of the Ordinance, as stated, increased the rate of tax on companies to 30 per cent. The company thereupon applied to the appellant for a reassessment of its tax for 1951 on the ground that under the proviso to section 39 a rate of 20 per cent. only ought to be charged on that part of its chargeable income for 1951, which was equivalent to the gross amount of dividend paid in November, 1950. The appellant refused to admit the company's right to that reduction. The Board of Review overruled the refusal and awarded the company the reduction of rate claimed. The High Court and the Court of Appeal upheld that award.

The appellant's case was that, for the proviso to apply, the dividend must have been paid out of income which accrued or arose during the year of assessment itself—namely, 1951; alternatively, that at any rate the dividend must have been paid during that year; and that, as it was not so paid, he had no legal power to apply the proviso in the company's favour. Their Lordships stated that that was to give to the words " chargeable income " a meaning for that purpose which was flatly in contradiction to the meaning which had been built up for them by the previous sections of the Ordinance. " Chargeable income " was derived through " assessable income " from " statutory income," and " statutory income " was the income of the preceding year, calendar year or accounting year. " Chargeable income " was, therefore, the income of the preceding year, less certain prescribed allowances and deductions. The context of the proviso contained nothing to give it a different meaning. The appellant invoked the familiar conception of the United Kingdom tax system that computation by a previous period as basis was merely a way of measuring the income of the year of charge, and that it was that income which remained the true subject of charge. But, even if it were accepted that the somewhat metaphysical theory of the United Kingdom system had any application to section 10 [in Part III of the Ordinance entitled " Imposition of Tax "] and section 31 [in Part V, headed " Ascertainment of Statutory Income "], and to the other relevant sections of the Ordinance, it would remain clear that the words " chargeable income " had a precise statutory meaning under the Ordinance which precluded the application to them of any such theory. All the courts in Malaya were right in holding that the company's payment of the dividend in November, 1950, did satisfy the condition required for the operation of the proviso. The appellant was, accordingly, wrong in supposing that he was not legally entitled to exercise his power under the proviso in favour of the company.

The next question, their Lordships stated, was what was the effect of the proviso. All the courts in Malaya had taken the view that the appellant had no discretion whether or not to exercise the power which the proviso gave. The Court of Appeal said: " The conclusion, therefore, at which we arrive is that the answer to the first question is that the Comptroller, in the particular circumstances set out in the proviso, cannot leave the rate of tax unaltered, and is bound either to charge at a lower rate (namely, 20 per centum) or at no rate in his discretion." That seemed to assume that the appellant must reduce the rate to at least 20 per cent., a construction of the proviso which was misconceived. They (their Lordships) took the view that it was impossible for any court of law to choose between the professed explanations of each side of the purpose of the power, since the wording or context of the Ordinance provided no material on which a legal choice or rejection could be made. The Ordinance created a discretion to exempt part of income from taxation or to reduce the rate of tax, and prescribed the condition on which alone that power could arise. But words were then chosen which indicated that the power was permissive, not mandatory; and no further regulation was made as to the nature or object of the power. It was possible that the Ordinance needed reconsideration on that point. In their Lordships' view the true position was that, while the company was an " aggrieved person " within the meaning of section 75 (1) of the Ordinance, the grievance consisted, not in the fact that its rate had not been reduced—the proviso did not create a legal right in the company to have the rate reduced—but that, owing to a misconception of the law on the part of the appellant, he had failed to consider whether and to what effect he ought to have exercised his power to reduce it. The case was not one in which the court ought to substitute a decision of its own for the discretion vested by statute in the assessing authority, and so send the assessment back to the appellant with a direction as to the amendment which he ought to make. That was the appropriate action in some cases: see *Minister of National Revenue* v. *Wright's Canadian Ropes, Ltd.* [1947] A.C. 109. But here the appeal courts, from the Board of Review upwards, had had to deal with a failure to consider the exercise of a power, intended by the Ordinance to be entrusted to the assessing authority, when the failure had arisen from no other reason than that the authority believed that in law the condition had not arisen which authorised the power to be put into operation. The best way of carrying out the purpose of the Ordinance was to follow the course taken in *Pioneer Laundry and Dry Cleaners, Ltd.* v. *Minister of National Revenue* [1940] A.C. 127, by treating the appellant's refusal to entertain the company's application as being unfounded in law and therefore invalid, and to direct him to take the matter properly into consideration on the footing that the dividend was paid out of chargeable income. The appeal would be allowed and the orders of the Board of Review, of the High Court and of the Court of Appeal reversed, except so far as the first-mentioned order held that the company's dividend was paid out of chargeable income for the year of assessment 1951.

CRIMINAL LAW—Retrial: Judge's notes of previous trial.

Ramsook Ramlochan v. *The Queen* [1956] A.C. 475 was an appeal from a judgment and order of the Court of Criminal Appeal of Trinidad and Tobago affirming the appellant's conviction at the San Fernando Assizes, Trinidad, of the murder of Minwatee Ramlochan (also called Toy) on June 12, 1954. The appellant was then 22 years old. The body of the deceased, a girl about 13 years of age, whom the appellant had married according to Hindu rites although he had a wife living whom he had not divorced, was found fully clothed about 100 yards from the appellant's house, decapitated by some instrument such as a cutlass. There were no eye-witnesses of the murder, and no, or very little, blood at the place where the body was found. It had never been discovered where the girl was murdered. The appellant, who had pleaded not guilty, and relied on an alibi, had throughout maintained that the girl was alive when he left her in the morning. He was first tried in March, 1955, when the jury disagreed. He was convicted at a retrial in May, 1955.

On the present appeal the appellant contended that he had been prejudiced in his defence at the second trial because his counsel had been refused a copy of, or access to, the judge's notes of the first trial. (No provision was made by the laws of Trinidad and Tobago for the taking of shorthand notes of the proceedings at the trial of a person on indictment.) Another ground of appeal was that, in the middle of the cross-examination of the appellant at the trial, counsel for the prosecution put questions which suggested that the blow was struck, not by the appellant, but by a named man—who was not tried—and that the appellant was aiding and abetting.

The Board stated that section 10 of the Criminal Appeal Ordinance provided that, on appeal against conviction or sentence, or on application for leave to appeal, the trial judge was to furnish to the registrar, in accordance with the rules of court, his notes of the trial. At the hearing before the Board their Lordships ordered copies of the judge's notes to be made available to counsel for the appellant, and adjourned the hearing to see whether the notes disclosed any material discrepancies in the evidence given at the second trial. In the result, counsel stated that he had discovered no material discrepancies which had not been put to witnesses at the trial. While, accordingly, the Board would find themselves unable to give any weight to that particular ground of appeal, they would express their opinion on the point raised. No authority had been cited to show that a party was entitled as of right to access to a judge's notes in a previous trial for use in a subsequent trial, and no such right existed apart from any statutory provision. In *Rex* v. *Boysie Singh and Others* (1950) XI Tr.L.R. 17 it was held: "Where there is a retrial and it is desired to prove at the second trial inconsistent testimony of witnesses at the first trial, it is undesirable for counsel of a prisoner at the first trial to give evidence of statements made at that trial. The judge's longhand note of the evidence is the best evidence of such testimony." That was a decision only on what was the best evidence of what was said at a previous trial. It did not follow that a party was entitled to demand production of a judge's notes of the evidence at the first trial for the purposes of cross-examination of witnesses at the second trial, though it might be thought convenient, or proper, or desirable, in some cases to make such notes available to the parties. The Court of Criminal Appeal considered it to be contrary to authority to say that a judge's longhand notes of evidence were the best evidence of the testimony given, and that on that point *Rex* v. *Boysie and Others* should be overruled. The Board reserved their opinion on that point, which it was not necessary to decide on the present appeal.

The second point was that in cross-examination of the appellant certain improper and prejudicial questions were put to him which represented a complete change of front in the case which the prosecution had hitherto taken, and which the judge later took up and made matter for consideration by the jury. The Board were unable to take the view that there was any illegitimate or improper exercise of counsel's right and duty to cross-examine the appellant. The Crown's case was that the appellant had murdered the girl. How and in what circumstances the fatal blow was struck was one of the mysteries of the case. Whether or no the appellant, if he carried out the murder, was assisted by someone else was another unknown feature of the case. Whether the appellant himself struck off the girl's head or was a party to someone else doing so was immaterial. In either case he was guilty of murder. It was open to the jury to take either view on the circumstantial evidence in the case, and they might well have thought that the evidence pointed more to the appellant's having the assistance of someone else, particularly the fact that the body and the head must have been transported from the place where the murder was committed to the place where the body and head were found. Nor were the Board able to see any change of front in the prosecution's conduct of the case. The Crown was not bound to state its theories in advance. Those theories were inferences from the evidence which it might be assumed that counsel for the Crown had explained to the jury in opening that he was about to lead. Nor could it be extracted from the evidence led for the prosecution that the Crown had tied itself to any particular view of how the murder was committed. In cross-examination, however, counsel was, in the Board's view, bound to put to the appellant any inferences from the evidence which he proposed to put before the jury. So, also, in his summing-up the judge was entitled to state to the jury the alternative inferences which might be drawn from the evidence as to the manner of the murder. On the evidence it was open to the jury to take the view that the appellant committed the deed alone or that he committed it with the assistance of some other person. On the further objection that the trial judge failed to direct the jury that they must be satisfied not only that the appellant was present, but that there was evidence that he was present aiding and abetting the commission of the crime, there was, in the Board's view, an adequate direction given on aiding and abetting. In the circumstances of the case and on the whole evidence led it would have been impossible to hold that if the appellant was present at the murder he was not at least aiding and abetting. The appeal was dismissed.

CURRENT PERIODICAL LITERATURE

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FAIR PLAY FOR THE ACCUSED.

We find it stated in textbooks to be the rule of English law that, where a confession has been made in circumstances which render it inadmissible in evidence, it is competent to lead evidence of facts discovered in consequence of the confession and of such part of the confession as strictly relates to those facts. The theory of the rule is that the discovery of facts confirming the truth of the confession removes the reason for treating the confession as wholly inadmissible, namely, that a statement induced by fear or favour cannot be relied on. The question had not apparently arisen in Scotland before the recent case of *Chalmers* v. *H.M. Advocate*, 1954 J.C. 66; 1954 S.L.T. 177. A youth was there taken to a police station in the course of inquiry into a robbery and murder, and after questioning made a statement to the police. The statement itself was not tendered in evidence against him at his subsequent trial, but the Crown sought, and was allowed, to prove that he went to a cornfield with the police and pointed at the place where a purse lay, which had been in the possession of the murdered man. If the interrogation by the police caused the statement which emerged from it to be inadmissible as unfair to the accused, the Lord Justice-General said on appeal, the same objection must apply to evidence of the conducted visit to the cornfield, and it was fallacious to draw any distinction between an oral description by the accused of the place where the purse was, and a silent demonstration by him at the place. *Chalmers* v. *H.M. Advocate* is thus in sharp contrast with the leading English case of *R.* v. *Gould* (1840) 9 C. & P. 364, where a policeman was allowed to give evidence that the accused told him he had thrown a lantern into a certain pond although the accused's statement to the policeman was not admitted as a whole, the lantern having been found in the pond as a consequence of the statement.

Mr. A. Gotlieb, writing in the *Law Quarterly Review* for April, 1956, argues that the principle laid down in *R.* v. *Gould* is far from firmly established. Cases in which the principle has been applied are in the distinct minority and there are later as well as earlier cases inconsistent with it. He shows that authority may be cited for five different propositions: (1) Facts discovered through a confession may be proved in evidence, but they cannot be in any way connected with the confession. Thus, a witness is allowed to testify that stolen property was found in a certain place but he must not say it was discovered as a result of a statement made by the accused, still less refer to the terms of the statement. (2) Evidence can be given of subsequent facts and that they came to light as a result of a statement made by the accused, but no part of the statement can be quoted. (3) As in *R.* v. *Gould*, evidence can be given of subsequent facts and of so much of the confession as distinctly relates to them. (4) Subsequent facts and the whole confession that led to their discovery can be proved. (5) Evidence of subsequent facts is wholly inadmissible.

If one accepts the idea that the only reason for excluding a confession is that it is untrustworthy, then propositions (2) and (3) above seem to be logical. But, according to Mr. Gotlieb, there are other reasons. Non-voluntary confessions are excluded on the ground also that it would be unfair to the accused to allow them, and perhaps on grounds of public policy, namely, in order to discourage the police from trying to extract confessions. If exclusion is based on these latter grounds, there can be no reason for discriminating between a confession and facts discovered as a result of the confession, at least if it is disclosed that the discovery of the facts followed from the confession. Mr. Gotlieb prefers proposition (1). Evidence of facts discovered through a confession should, he thinks, in general be admitted, subject to the judge's discretion to disallow it in certain circumstances. But the confession itself should not be received, whether or not it is confirmed by subsequent facts, and whether or not it is only sought to show that the discovery followed as a consequence without proving the terms of the confession or any part of it. Thus, the rule ought, according to him, to be the same as the rule in Scotland, as laid down in *Chalmers*, which he refers to with approval, for it does not appear that evidence of the finding of the purse by itself would have been held in that case to be open to objection. "The police have, of course," in the words of the Lord Justice-General, "the right and duty to produce all the incriminating evidence they can lay their hands on, from whatever source they may legitimately derive the clue which leads to its discovery, so long as any admission or confession by the accused is not elicited before the jury as an element in proof of guilt." By "legitimately" he obviously from the context cannot mean to exclude the questioning of a suspect. Accordingly, if as a consequence of Chalmers' confession the purse had been discovered in his house and not in a cornfield, evidence of that fact in itself would have been properly admitted. On the other hand, it would not have been admissible evidence for a police witness to state that in consequence of something said by Chalmers at the police station he went to a cornfield and found a purse. The crucial element is disclosure that the fact has been discovered in consequence of some statement made or act done by the accused. From the point of view of the prosecution in *Chalmers*, evidence of the finding of the purse would have been of no value by itself. "It was essential that the appellant should be linked up with the purse, either by oral confession or by its equivalent—tacit admission of knowledge of its whereabouts." It is of minor significance, provided the crucial disclosure is made, whether evidence of a part or all of the confession is allowed, or whether evidence merely that the subsequent fact was discovered owing to the confession is admitted. Often, if not usually, evidence of the latter kind will be equally dangerous to the accused.

Professor Gibb has complained that Scottish courts are too much influenced by what he regards as sentimental scruples in favour of accused persons, and he commends, by way of contrast, the judicial attitude in England, where, he says, there is not the same "feverish anxiety to smell out unfairness which is so typical of Scottish practice" ("Fair Play for the Criminal," 66 J.R. 199 at 227). Among the cases he cites to show the more robust English practice is *R.* v. *Warickshall* (1783) 1 Leach 263, where a woman was charged with receiving stolen property. She made a statement which was rejected in evidence, but as a result of her statement the stolen property was found concealed in her bed and evidence of this fact was admitted. There is no inconsistency between this case and that of *Chalmers* if, as appears, evidence was not given that the discovery of the property was a consequence of the statement made by her. Professor Gibb also refers to the well-known case of *R.* v. *Voisin* [1918] 1 K.B. 531, in which evidence was held to have been properly admitted that the accused, who had not been charged or cautioned but was detained in custody for inquiries, was asked by the police to write down the words "bloody Belgian," and spelled them "bladie Belgiam," corresponding with words written on a piece of paper found in a parcel together with the body of a woman. It is not clear that this evidence would have been rejected in Scotland. The circumstances in *Davidson* v. *H.M. Advocate*, 1951 J.C. 33; 1951 S.L.T. 109, were very similar and *Voisin's* case was cited with approval. A similar comment might be made about some of the other English cases mentioned by Professor Gibb. The difference between English and Scottish practice in regard to evidence of confessions is more a matter of emphasis than of substance or principle and seems to be of little importance. Thus, although the term "voluntary" in relation to confessions has been given a somewhat narrower meaning in England than in Scotland, English judges may, and frequently do, reject confessions not only on the ground that they have been induced by fear of prejudice or hope of advantage, but also on the ground of unfairness to the accused.

It may be that Scottish courts are slightly more apt to reject evidence of confessions than English courts, and that the tendency has gone too far, especially in recent years. It should be observed, however, that the cases of *Aitken*, 1926 J.C. 83; 1926 S.L.T. 310, *Rigg*, 1946 J.C. 1; 1946 S.L.T. 49, and *Chalmers*, *supra*, on which Professor Gibb's complaint is largely based, were rather special in that all three arose out of murder charges against youths aged sixteen or seventeen who were taken alone to police stations and subjected to police interrogation. It does not follow that evidence of statements made in answer to questions by the police will invariably be rejected once an accused has come under suspicion or is detained in a police station for inquiries. It was made clear by the Lord Justice-General in *Chalmers* that the circumstances of each case must be considered before deciding to admit or reject a confession, and he was careful to say no more than that once a person has come under suspicion by the police "further interrogation of that person becomes very dangerous and, if carried too far, *e.g.*, to the point of extracting a confession by what amounts to cross-examination, evidence of that confession will almost certainly be excluded." An answer made by a suspected person, or possibly even an arrested person, in answer to an isolated question by a policeman might therefore be admitted in evidence against him.

Professor Gibb criticises the test of fairness to an accused as a standard for admitting or rejecting confessions on the ground that it is both too vague and too favourable to the accused. The " sporting " theory of criminal justice which he attacks has also sometimes been condemned by English lawyers, and in some ways English practice seems to us unreasonably considerate to offenders. It may be conceded that the spectacle of a plainly guilty man getting off on what might seem to be a technical point is not generally edifying, and one can be fairly certain that many, or most, confessions which are rejected in evidence are in fact true. Yet powerful arguments may be put forward for leaning over backwards in the accused's favour at the risk of allowing some criminals to escape the penalty they deserve. Just as the essence of the judicial function in a civil case is to hold the balance evenly between two opposing parties, so surely it is of the essence of a criminal trial that the judge should see that justice is done between the individual brought before the court and the Crown, that is the State. It is not the judge's duty to put down crime. That is for the police and the prosecuting authorities. His duty is towards the accused as much as towards the prosecution. And since the former is in an incomparably weaker position than the latter, which has behind it all the resources of the State, it is not possible to deal equitably between the parties without strict adherence to certain rules that tend to the advantage of the accused and the disadvantage of the prosecution. The notion of fair treatment for the accused is therefore central to criminal practice and procedure. Nor is it a notion that can be rigidly defined, since the ways in which the defence may be prejudiced vary infinitely according to circumstances. The court must have a measure of discretion to stretch the rules in favour of the accused where it seems necessary. Among the rules designed to favour the accused are those regulating the admission in evidence of confessions. As Mr. Gotlieb points out, and as Scottish decisions make plainer than English, these rules are not based merely on the experience that a non-voluntary confession is untrustworthy, but flow from the fundamental principle of English and Scots law which protects accused persons from self-incrimination, unless they freely choose to provide the prosecution with a statement tending to show their guilt, or plead guilty at their trial, or elect to give evidence on their own behalf and so expose themselves to cross-examination. Those who, like Professor Gibb, think that accused persons are handled too tenderly are somewhat apt to confuse two quite different things, namely the manner in which the police are entitled to treat suspects and the manner in which they ought to be treated when they appear in court. Within limits the police may, and must, be ruthless in the pursuit of criminals, and they are allowed to adopt methods such as the use of agents-provocateurs which are neither fair nor nice in order to obtain evidence. But it does not follow that a court of law, whose function is entirely dissimilar, should tolerate any unfair treatment of an accused when it has to determine whether to find him guilty or not guilty.

If a criminal trial is to be regarded as a scientific experiment to discover whether a person has committed an offence or not, then without doubt rules designed to protect him from being prejudiced are out of place altogether, since they can only hamper the process of ascertaining the truth. But is this the right way to look at a criminal trial? Certainly not, according to our law. Other systems may differ. An article by Professor Robert Vouin, Professor of Law in the University of Bordeaux, in the *International and Comparative Law Quarterly* for January and April, 1956, deals with the protection of the accused in French criminal procedure. Elaborate precautions are taken in France, as he shows, to ensure that accused persons are neither brought to trial nor, if tried, convicted without the fullest investigation of the facts. A French criminal court will have before it more information on all aspects of the case than an English or Scottish court. Thus there are practically no rules prescribing the evidence that may and may not be adduced by the prosecution, provided it has been legally obtained, a condition upon which French courts appear to insist more strongly than English or Scottish. All evidence that is reasonably probative is admissible with this exception, and a very wide interpretation is given to the conception of what is probative. The past history of the accused prior to the offence or offences with which he is charged not only may be but always are inquired into, and the trial begins with a detailed interrogation of him by the presiding judge, whose duty it is to clarify all the circumstances of the case so as to lead the court to the discovery of the truth. Professor Vouin is inclined to think that accused persons are protected to an excessive degree in Britain, and that while an innocent man is equally well off in either country, a guilty one is more likely to be convicted in France. It is possible that he is right. Assuming that he is, does this prove that the French criminal system is superior to ours? We are entitled to question the conclusion.

No doubt the conviction of an innocent man is a calamity. But it is not equally calamitous for a guilty one to be acquitted, provided this does not happen too often. It may be a small price to pay for the advantage of a system which enables the judge to play the part of a neutral arbiter between the prosecution and the accused. There are instances in which from the point of view of equity it is right that an accused who is only technically or to a minor degree guilty should get off, and the failure of a prosecution, though strictly unmerited, may be a matter for gratification rather than regret on other good grounds. The mere fact of being brought to trial is a considerable ordeal, for which the State pays no compensation in the event of acquittal, and which may well be sufficient punishment. After all, punishment is not an end in itself, but only a means towards an end, that is to say, the elimination of crime, and if the end can be obtained without punishment being necessary so much the better. A system of criminal justice may be too efficient, and a fair trial may be preferable to a more scientific one in which the accused is less fairly treated. Readers of Rabelais will remember Professor Vouin's fellow-countryman, Judge Bridoye, whose practice it was to decide his cases by throwing dice. While that was perhaps overstepping the mark a little, if a choice had to be made between his method and, let us say, a machine by the aid of which offenders could be automatically convicted and suitably punished without the possibility of error, even the non-criminal classes might hesitate before choosing the latter.

In order that a trial should be fair, or, at any rate, appear to be fair, which is scarcely less important, the position of the judge must as far as possible be one of complete neutrality. It is the most serious defect in our eyes of the inquisitorial, or semi-inquisitorial, system practised in France and other Continental countries, that the presiding judge takes such an active and predominant part in the conduct of the case that he can only with great difficulty remain impartial, and probably can never appear to both sides to be impartial. An accused person may, under French criminal law, refuse to reply to the interrogation of the presiding judge. But Professor Vouin concedes that the interrogation is liable to induce a confession, though, of course, no unlawful pressure may be used for this purpose. He observes that, since in England the judge may in charging the jury invite them to hold against the accused his failure to give evidence, there seems to be little practical difference between the systems of the two countries. Surely, however, there is no real comparison between the power of an English or Scottish judge, sparingly exercised as it is, to refer in his summing-up to the silence of the accused, and a power of interrogation of the accused which is unlimited in scope, invariably used, and almost bound owing to its manner and introduction at the beginning of the trial to exert a preponderant influence in the subsequent proceedings. It should be added that the cross-examination of witnesses, such as it is, in a French trial is also conducted by the presiding judge, and that counsel for the defence can only question a witness through him as intermediary. Might it not be maintained that if the truth can only be discovered by such means, it would be better undiscovered? Is it any more in accordance with right that the court should employ its superior moral force to compel an accused person to incriminate himself than that the prosecution should employ its superior physical force to the same end? It is conceivable that such a mode of criminal procedure may have far-reaching psychological effects on the attitude of the general public towards the law and towards the State itself. Certainly, it is more than likely that the functions assumed by criminal judges on the Continent constitute at least one of the reasons for the unsatisfactory experiences of Continental countries with juries. There has been from the introduction of the jury system in France a constant feeling of mistrust entertained by jurors against judges. On this ground French law, following that of Belgium, has prohibited the charging of the jury by the presiding judge since 1881. In 1932 it was provided that after the jury had deliberated alone on the question of guilt it should join with the judges in deciding a sentence. More recently the number of jurors has been reduced first to six and then to seven, and jury and judge now deliberate together first on the question of guilt and then on the determination of sentence. In fact, they are no longer jurors but lay assessors, or rather lay magistrates, and they take their seats accordingly on the bench alongside the three judges. The position of the jury is apparently a controversial question at present in France, some advocating a return to the old system and others the abolition of the jury altogether. It cannot cause surprise that mutual confidence between judge and jury should have been difficult to attain where the judge acts as a protagonist in the elucidation of evidence. The jury system can only be successful when there is co-operation between the bench and the jury box, and this requires that they should both be neutral between prosecution and defence. It may be said, of course, that trial by jury is an outworn method, with more drawbacks than merits, which ought to be replaced by some better system. Nobody, however, seems to have suggested, in the case of serious crimes, a practicable alternative. It has evidently not yet at least been found in France.

ARTIFICIAL INSEMINATION.

The first person to impregnate a woman artificially is said to have been John Hunter, the great eighteenth-century physiologist and surgeon. The earliest case reported in the United States was in 1866, and up to 1941 the estimated number of pregnancies induced by this means amounted to about 10,000. The practice had become well enough known in this country, or at least in England, for the Archbishop of Canterbury to appoint a committee in 1945 to consider it with reference to its theological, moral, psychological and legal implications. No doubt it is a practice which is on the increase and is capable of giving rise to difficult problems, not only for doctors and theologians, but also for lawyers.

There are three types of artificial insemination of human beings, that is to say, of married women, on whom alone the operation is carried out by reputable doctors: (1) impregnation of a woman with her husband's semen, known as artificial insemination husband, or "A.I.H."; (2) impregnation with semen other than that of her husband, called artificial insemination donor, or "A.I.D."; (3) impregnation with a mixture of the husband's semen and that of another man. From a legal point of view, the first type does not appear to present any difficulties, and it is only the second, and possibly the third also, that matter. Two questions in particular arise: (a) Is a child born as a consequence of A.I.D. legitimate or illegitimate? (b) Does A.I.D. involve adultery on the part of the wife? The questions are strictly separate from each other, for a child born in consequence of adultery may be deemed to be legitimate by reason of the presumption *pater est*. On the other hand, the answer given to the second question may well determine the answer to the first. The prior question, therefore, in logic as in time is whether A.I.D. is or is not adultery. No authoritative answer has, it appears, been given by any court in the British Commonwealth, or elsewhere, though there have been judicial dicta in American and Canadian cases both for and against. The legal members of the Archbishop of Canterbury's committee thought that the answer should be in the affirmative. Mr. G. P. R. Tallin, Q.C., Dean of the Manitoba Law School, writing in the January and February, 1956, numbers of the *Canadian Bar Review*, comes to the same conclusion. An opinion to the opposite effect has been expressed by others, notably by Lord Merriman in a debate in the House of Lords. In Scotland Professor Montgomery (1949 S.L.T. News, p. 82) and the editors of Walton on *Husband and Wife* (3rd ed., p. 55) have agreed with Lord Merriman.

After considering the reasons for which legal consequences flow from a finding of adultery, Dean Tallin inclines to the view that there are two tests in law of adultery. First, does the act in question involve conduct between one of the spouses and a third party of such an intimate nature as to destroy any faith in the chastity or loyalty of the spouse? Secondly, does it involve consent by a married woman "to the use by a stranger of her reproductive powers in such a way as to create the possibility of introducing into the husband's family a child not biologically related to him"? . Sexual intercourse without risk of pregnancy and risk of pregnancy without sexual intercourse may be equally destructive of the marriage tie, and therefore either may constitute adultery when a party concerned is married to someone else. But if there is to be only one test of adultery, then it should be, he believes, whether the conduct in question involves the risk of pregnancy. Assuming that this test is adopted, consent by a married woman to A.I.D. constitutes adultery equally with sexual intercourse in the full sense of the term. If, however, the test is rejected, he thinks that A.I.D. still constitutes adultery because it satisfies the definition of voluntary sexual intercourse between a married person and a person of the opposite sex other than the spouse. The phrase "sexual intercourse" has no exact or absolute meaning, and it has been recognised by the English courts that there may be degrees of sexual intercourse. An act of adultery has only three essential characteristics: (1) it must involve two persons of the opposite sex who are not married to each other; (2) "there must be contact by at least one of the actors with the primary sexual organs of the other for purposes other than a bona fide medical examination, treatment for a pathological condition or sick-room care"; (3) the person against whom adultery is alleged must have voluntarily made or submitted to such contact. Adultery in law may be based on any kind of sexual intercourse that has these three essential characteristics, even if unaccompanied by any other incidental factor. Consequently, A.I.D. of a married woman is adultery between her and the donor of the semen, intercourse between them being conducted through a third person who injects the semen into the woman's body as an intermediary. The consent of her husband does not make it otherwise, any more than his consent to an act of ordinary sexual intercourse between his wife and a stranger.

Dean Tallin argues forcibly and wittily. Of the third type of insemination referred to, where a mixture of the husband's semen with that of some other man is used, he writes: "It enables a moronic mother and a husband with both genital and cerebral weakness to delude themselves that the child is his own, or a husband ignorant of the mechanism of fertilisation to believe that he may, as a sort of plumber's help, claim some credit for the product. As *ex hypothesi* the husband's spermatozoa, if any, have hitherto been listless and ineffectual, the odds against them overcoming competition and arriving first at the ovarian goal of spermatozoan ambition are longer than the likelihood of winning ten consecutive Irish sweepstakes." Having regard both to what is administered and to the mental condition of those for whom it is administered, he thinks it may suitably be called confused artificial insemination, or "C.A.I." The eloquence displayed by Dean Tallin seems to be the result of a *saeva indignatio* against this novel, odd, interesting, and to him utterly repugnant practice, and does not help to inspire confidence in the soundness of his conclusions. Of the tests of adultery he proposes, the one he prefers is obviously quite unacceptable, since it can apply only to one sex, and the fact that there may be a historical basis for discriminating in this way between the sexes does not make it any more easy to accept. A husband would be entitled to father any number of bastards without becoming an adulterer.

In support of his alternative contention that A.I.D. constitutes adultery because it is a form of sexual intercourse, Dean Tallin relies largely on some English decisions, especially *Sapsford* v. *Sapsford and Furtado* [1954] P. 394, where adultery was held by Karminski J. to have been proved even though complete penetration was not achieved. It is a long way, however, from the view that adultery may take place where something less than normal intercourse is established to Dean Tallin's proposition. Indeed, *Sapsford's* case would seem to be directly inconsistent with it, since the argument that "manual satisfaction" constituted adultery was explicitly rejected. The idea that mere sexual familiarities between persons of opposite sexes can amount to sexual intercourse might lead to strange conclusions. It is still more startling to be told that there can be such a thing as vicarious sexual intercourse, without physical contact between the guilty parties. In an article replying to Dean Tallin in the *Canadian Bar Review* for April, 1956, Mr. G. A. Hubbard points out that sexual intercourse involves two actors but is one act, occurring at one time. When can the act be said to have occurred in the case of artificial insemination? At the time the semen was obtained, or at the time it was introduced into the woman's body? It can scarcely be said to have begun with the ejaculation of the semen and continued until impregnation is completed. There is not one act here, but two separate acts which may occur at widely different places and times. It follows from Dean Tallin's definition of sexual intercourse, and in fact he draws the conclusion himself, that A.I.D. involves adultery not only between the donor and the woman concerned, but also between her and a male physician who carries out the operation. And if the physician why not then, for example, the messenger or postman who delivers the semen to the physician? The woman in question might be held to have committed adultery with a dozen different men as a result of one operation. Yet we usually think of sexual intercourse as an occasion when, if ever, two is company and three none.

Mr. J. B. Priestley has recently complained of a lurking Puritanism which he says he found in Canada. There seem to be signs of it in Dean Tallin's article. Mr. Hubbard, although he disputes the theory that A.I.D. constitutes adultery, is "in perfect sympathy with the author's attitude of condemnation of it." According to him, artificial insemination in any form, A.I.H. as well as A.I.D., is a perversion of the natural order and immoral *per se*, whereas normal sexual intercourse is immoral only *per accidens*. A.I.D. is not adultery, but it is more heinous than adultery, being cold, calculated and scientific, and lacking the antecedent concupiscence by which guilt is mitigated. One detects a flavour of theology in these contentions. And yet one might suppose that the practice of artificial insemination would commend itself to some schools at least of theological opinion, since it makes possible the continuation of the human race without giving sexual pleasure to anybody. Mr. Hubbard presumably would not object to a necessary surgical operation because the surgeon performed it in a cold, calculated and scientific manner. The method by which it is carried out is one thing; the purpose for which it is carried out, namely, to preserve life or restore health, is quite another, and the fact that the surgeon has a cool head does not prevent him from also having a warm heart. In the same way, artificial insemination as a method of inducing pregnancy must be distinguished from the end it is employed to attain, that is to give a woman the opportunity of having a child of her own when she has no hope of obtaining one in the normal manner. Apart from theological considerations, the impregnation of a woman by artificial means seems to be no more a perversion of the natural order than a surgical operation, or rather it is less unnatural because it is less dangerous and complicated than most surgical operations. No doubt it would be more natural to allow people suffering from disease to go on suffering or die without resorting to cold and calculated scientific remedies. If that is not advocated, why object to artificial insemination, regarded purely as a method of remedying the evil of childlessness? Whether or not the method is unnatural, there can be nothing more natural, or laudable, than the desire of a woman to have a child of her own.

It may, however, be wrong for her to satisfy her desire, when she has a husband who cannot provide what is expected of him. Dean Tallin thinks it is. But the grounds he puts forward for objecting to A.I.D. suggest that his views are the outcome of emotional dislike rather than reason. The practice of artificial insemination, he says, if it became widespread might destroy family life as the basis of human society. How this lamentable result would come about he does not make clear. It is difficult to imagine that it ever could become widespread, for the circumstances in which women will resort to A.I.D. must obviously be exceptional. People are not likely to abandon the more orthodox way of procreating children if they can help it. And so far from destroying family life, surely to give a childless married woman the means of producing offspring is to do just the contrary.

At the same time, we can admit that A.I.D. may become sufficiently common, if not widespread, to give rise to various problems from a legal and from other points of view, particularly in relation to the paternity of children resulting from its use. It is possible that legislation may become necessary. A recommendation has been made recently by the Royal Commission on Marriage and Divorce that A.I.D. without the husband's consent should be made an additional ground for divorce and judicial separation. The moral aspect is not one on which lawyers are specially qualified to speak. Dean Tallin believes that childless women should put up with their lot, or if they find it really intolerable adopt a child. Feminine opinion may regard him as unsympathetic, and on this point it is perhaps entitled to be heard with more respect than masculine. On the whole it is likely to display less of that superstition and irrational prejudice to which human beings are so prone in sexual matters, whether in Canada or other countries.

An occasion of some importance is the simultaneous appearance of two new quarterly periodicals, *Public Law* and *British Tax Review.*

The first is edited by Mr. J. A. G. Griffith, Reader in English Law in the University of London, with an Editorial Board of much distinction. It will deal with constitutional and administrative law at home and in the Commonwealth and dependent territories, and the intention is to provide a place for the examination and discussion of the related problems of law and government. As well as notes and comments and two or three full-length articles, each issue will contain a novel feature in the shape of a digest of current developments within the scope of the periodical. The leading article in the first number (Spring–Summer 1956) consists of a comprehensive survey by Sir Carleton Allen, Q.C., of administrative jurisdiction, designed to give an impression of the great variety of adjudicating agencies which are empowered today, over and above the ordinary courts of law, to decide upon the rights, duties, claims and liabilities of citizens.

British Tax Review, under the editorship of Mr. G. S. A. Wheatcroft, has aims which might be described by some people as more practical and by others as more materialistic than *Public Law*. Primarily written for the practising accountant and lawyer, it will also appeal to other professional and business men, and provide a clear picture of the basic principles underlying British taxation, besides dealing with taxation problems of topical interest and covering legislative and current cases. There is to be a regular series of articles entitled "Modern Methods of Minimising Taxation."

Periodicals also received: *The Modern Law Review*, *Jus* (Milan), *Oklahoma Law Review*, *La Justícia* (Mexico), *New York University Law Review*, *Revue Internationale de Droit Comparé*, *The American Journal of International Law*, *Documentation Juridique Étrangère* (Brussels), *Saturn*, *The British Journal of Administrative Law*, *The Medico-Legal Journal*, *The Western Political Quarterly*, *Revista del Foro* (Lima).

RECENT LITERATURE

British Government Inspection as a Dynamic Process. By John S. Harris. 1955. London: Stevens & Sons, Ltd. Price 25s. net.

Mr. Harris's book, despite its title, is concerned with the place and influence of central government inspection in local government services in England and Wales. To a great extent it is descriptive. He is concerned with the development and practices of inspection in regard to Poor Law, Public Health, Education, Police, Fire Services and Highways. In each case some account is given of the development of the inspection system, which, particularly with the public health and general services, involves some discussion of the development of the services themselves. There is no doubt that as such the book is valuable. The processes of government tend to remain obscure except to those brought into immediate contact with them. To the ordinary student the title "Inspector" may evoke vague mental images of an inquisitor; it will not generally suggest the almost academic research and approach of some of the inspectorates. Nor does the title with its slightly pejorative aura, easily convey the friendly and collaborative attitude of many inspectors. As a book that can add reality for the student the present one is to be welcomed; the student will certainly gather from it useful and sound knowledge drawn from many sources about a particular process.

Undoubtedly such monographs on pieces of governmental machinery are desirable, and there have in the past been too few of them. But they have their risks. The concentration on one particular institution may mean that too much credit is given to that. It is true that the present author does warn against crediting all progress, particularly in health and poor law fields, to the inspectorate. Yet it is easy to get the impression that the development of the service and the development of inspection are the same thing. Inter-related matters too can easily be glossed over. The events of 1918 had major consequences on the organisation of police forces, and the emergence of the Police Council as one result inevitably changed the rôle of the inspectors, since much of their professional advisory function can be undertaken by the Council and not, as in Education, retained by them. Yet that there were events of 1918 is only gleaned with difficulty. Changing circumstances are also not always given due weight. Chadwick's inspectors were often, to a great extent, not enforcing standard solutions to problems, but discovering what the problems were. Clearly all present-day inspectors may not be faced with that situation. Services are established and research in many of the problems which concerned a nineteenth-century government is carried on outside the formal government machinery. That machinery too has become more subtle, and other and more efficient methods of control alter the rôle of the inspectorate. Such questions are hinted at, but advanced students might wish for more discussion of them.

Indeed one major question is not dealt with adequately. Underlying any discussion of the inspectorate must be a decision on the nature of local government and the proper relationship of the central government to it. While some activities of the inspectorates can be regarded as admirable whatever one's views on those questions, that is not true of all. The present book is clearly written from the point of view of the central government, and the beginner should be made aware that there are others. Perhaps these are criticisms of the book for what it does not purport to be—it is not an essay on local government. Yet " success," " efficiency," and the like cannot be judged without taking account of such factors. The preservation of the public health is no doubt good, the preservation of public health and of a theory of government might be much better. Dynamism alone is not enough. The real problem of inspection as it is practised is that it has two distinct aspects. So far as inspection involves only advice and co-ordination, it is consistent with a theory of local government. When it extends to the enforcement of standards it tends to be based on a theory of local administration. To ask for more in this respect is only to ask that a particular governmental process should be placed in perspective not only as against other processes, but also as against theories of government.

As it stands the book is useful and laudable, yet since suggestions as to how it, or others like it, might help students more do not detract from its substantial merits, one more may be risked. It is simply that the book might have lived up to its title with profit. Scottish practice in this field (as in others) often differs substantially from its English counterpart, and can serve to confirm or deny conclusions. Mr. Harris has shown what can be done to make interesting what appears to be an arid subject. Perhaps his successors may venture more broadly.

J. D. B. MITCHELL.

Contracts to Make Wills. By Professor Bertel M. Sparks, of the New York University School of Law. 1956. New York University Press. Price $5.00 net.

As early as 1682 the validity of a contract binding one to a particular devolution of one's property at death was recognised in England, and the first reported Scottish case (*Curdy* v. *Boyd* (1775) Mor. 15946) is close on 200 years old. It is therefore perhaps surprising that this principle has not received more practical recognition or development in this country than the reported cases and professional experience would indicate. That it has much wider application in the United States would appear to be evident from the number of cases cited in this most interesting " monograph." It is, however, frankly admitted that it is not generally among the devices favoured by the lawyer for estate planning, but that laymen resort to it widely, the flood of litigation on the subject being conclusive proof of its increasing use—or misuse. This, it is suggested, has created a situation calling for an inquiry into the social interests served by such contracts and an evaluation of the professional responsibility towards them. The legal profession are invited to give further study to the principles involved and in this non-technical, readable volume

Professor Sparks of the New York University School of Law analyses the legal relationships created by contracts to make certain provisions in wills.

The mutual will with its attendant question whether it is contractual and so irrevocable, or testamentary and revocable, is rarely to be encouraged. Professor Sparks deals with the problems it raises and emphasises that it never served any purpose that cannot be achieved by two separate wills; and he goes on to advise that if two wills are intended to be contractual a declaration to that effect should be written into each. Perhaps in our abhorrence of the mutual will we in Scotland have overlooked the use that might profitably be made of separate wills clearly expressed as being contractual and irrevocable.

But reciprocal wills are but one example of contracts to make wills, and Professor Sparks expands the possibilities in a way which cannot but stimulate interest in these days of high taxation and death duties. Among the aged of modest means (and the vast majority of the aged are of modest means) there is a strong desire to retain ownership of one's property until death, but also the necessity of providing care and maintenance for oneself. It is suggested that a contract to make a will is the only legal device by which this can be achieved, and that in this way care, nursing and companionship can be obtained by means of an agreement whereby some friend or relative provides these comforts in exchange for an undertaking by the elderly person to leave by will some part of his estate to such friend or relative. Ante-nuptial agreements, provisions for adopted children, settlements on divorce or separation of spouses, the disposition of partnership and company assets, and many others, are all suggested as possible subjects of such contracts.

The legal effects upon the ownership of the property concerned and the means available to the "promisee" for the enforcement of his rights before and after the death of the promisor are fully and clearly discussed. It is perhaps unfortunate that the author has not dealt with the effect which such contracts may have on liability to death duties. It may well be that in the United States such contracts create deductible debts of a wider nature than are allowed in this country, although it must be confessed that our authorities do not appear to indicate that such devices have yet been fully tested. There might well be room for more general obligations undertaken "bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit."

Our lack of clear authority may deter many legal advisers in this country from having the courage to try out some of the devices presented in this volume. But this is undoubtedly a subject calling out for wider consideration and research, and there is much in this book to stimulate very real interest. Many of the suggestions made and pitfalls to be avoided are worth careful study. The book is eminently readable and there are few American legal expressions which do not explain themselves.

A. H. E.

The Law of Carriage by Inland Transport. Third edition by Otto Kahn-Freund, LL.M., DR.JUR. 1956. London: Stevens & Son, Ltd. Price 35s. net.

The writer well remembers this book in its original form and provenance, the *Law of Carriage by Railway*, by H. W. Disney. In that form it was what is called—certainly for a law book—a "slim volume," but it was nàne the waur o' that and it read easily and instructed accurately. Today, in a more matronly form, it does not so readily convey its virtues, at least to the eye. It is portly and very solid. But with that, of course, everything is not said. Still, the heart of the conscientious reviewer, faced with the task of reading it through, is not light. That is in the nature of the case. Close page after close page, many with half pages of notes, myriads of dull details derived from dreary Acts of Parliament—all this is here, but it is all inevitable in a book so much concerned with modern statutes.

The question for the reviewer is, does it all add up to a book which, by excellence of order, clarity of exposition, and the right point in the right place, forms a useful guide to the practitioner who is anxious to find the law on some particular matter. So tested and judged, "Kahn-Freund" answers admirably.

It is when the legal reader comes into the second part of the work that he begins to feel more at home than in the aridity of such earlier chapters as those which deal with "standard rates," "disintegration of rates," the "substantive law of charges under a system of charges scheme" and the like. Here, in the more familiar company of *Nugent* v. *Smith*, *Limpus* v. *L. G. O. C.*, *Philipps* v. *Britannia Laundry*, even *Bourhill* v. *Young*, and many more, the practitioner finds the learned author dealing with such cases in their most modern setting. Such a chapter as Chapter 27 on *Persons Entitled to Recover Damages* is important, up-to-date and comprehensive without being lengthy. A modest amount of attention is paid to Scottish authorities, and the decision in *Edwards* v. *Railway Executive* in 1952 (cited only in the Appeal Cases) comes in for well-deserved criticism. This chapter is typical of the second half of the book.

But in whatever part the subject-matter of immediate importance is to be found the wise practitioner simply cannot afford not to consult Dr. Kahn-Freund's important work.

A. D. GIBB.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

Germany and the North Atlantic Treaty. A Legal Survey by M. E. Bathurst, C.M.G., C.B.E., LL.B., LL.M., PH.D., and J. L. Simpson, M.A., D.LITT. Published under the auspices of The London Institute of World Affairs. No. 29. 1956. London: Stevens & Sons, Ltd. Price £1 15s. net.

JURIDICAL REVIEW

LAW AND OPINION IN BRITAIN SINCE 1900

(*continued from p.* 146)

Contract is a department of private law of peculiar significance as, while probably no legal category enters so frequently into the daily life of every individual, albeit unknown to them, contract was the underlying conception of Benthamite individualism. The free individual, contracting freely, unfettered by the bonds of status, was their ideal. But even in the nineteenth century there was an increasing gap between the theory of free and equal contracts and the reality of practice, and this had led to a distinct reversal of the Benthamite theory. This trend has taken at least three forms: there is first in modern times an enormous increase of what the French call contracts of adhesion in which the free-will of the individual is limited to signing or not signing a form of contract drawn up entirely by the other party, mainly with an eye to his own interests. The individual can take the contract or leave it: he is unlikely to get any substantial variation in its terms and unlikely to be offered any very different terms by another party. Such contracts are common in hire-purchase, insurance, and many kinds of mortgage and security, such as with building societies. The second class comprises cases where there is a standard form of contract on which certain variations may be made, sometimes with statutory form given to it in part; such are the R.I.B.A. standard terms for building contracts, the government conditions of contract for public works, the standard terms and conditions for carriage of goods by railway, the standard forms of charterparty and bill of lading and the statutory provisions of the Carriage of Goods by Sea Act, 1924, and the various conditions of carriage and statutory provisions of the Carriage by Air Act, 1932. In all these cases the individual must contract on the other party's terms or not at all. The third class comprises the cases where the weakness of the Benthamite individualism was first apparent, cases of the contract of employment between a workman and an employer, or firm, or authority. Thus in the twentieth century collective bargaining by the union on behalf of its members, on the one hand, and the management of the employing concern on the other has become normal. In industrial relations collective has almost entirely superseded individual bargaining: where individual bargaining survives the agreement is usually to accept the terms unions have negotiated with large employers as minimum conditions. The famous case of *Mogul* v. *McGregor*,[27] is a classic of Benthamite liberalism with its affirmation of completely free trade, but that does not represent the twentieth century. The later case of *Crofter Co.* v. *Veitch*,[28] shows complete acceptance by the law of the existence of an economic struggle between organised groups, and shows that deliberate doing of harm in that struggle is not wrongful in the absence of disinterested malevolence. The trend has been in the direction of unions monopolising men and federations monopolising employers: in the *Crofter* case the employers' association and the workers' union co-operated against outsiders, and their action was held legitimate for preventing undercutting and unregulated competition.

It is abundantly apparent that the classic textbook contract, emanating from a concurrence of free wills, is now the minority, even the exceptional case. But all this has been the result not so much of public opinion or of legislation as of the growth of large business interests co-operating with others in their own line to look after their own interests. It is a common-law growth to which Parliament and public opinion have contributed little.

In the law of persons the trend of opinion has been what may be broadly called egalitarian and humanitarian. Thus the most noteworthy changes have been in mitigating the position of illegitimate children, and removing any stigma or disability attaching to them. The protection of young life in numerous ways has engaged the attention of Parliament. The Adoption Acts permitted *de jure* adoption, but have been largely transformed in practice into means for removing the stain of illegitimacy. The Infant Life (Preservation) Act, 1929, and the Infanticide Act, 1938 (both applicable to England only), sought to protect infant life and yet take account of the conditions which made it repugnant to modern conscience to treat killing in such cases as simple murder. The Children and Young Persons Acts of 1933 and 1938 (England) and 1937 (Scotland) are only the major items of a long series of Acts and individual provisions, all designed to protect young persons from harm, overwork, immoral or dangerous employment, and generally to protect their welfare and interests. The extensive code of statutes affecting education tends in the same direction.

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[27] [1892] A.C. 25.

[28] 1942 S.C.(H.L.) 1; [1942] A.C. 435.

In 1948 the report of the Curtis Committee on the Care of Children so stimulated public opinion that the Children Act of that year was passed at once to give further protection. This is the conspicuous case where public opinion demanded changes in the law, but in all the other measures opinion has been less vocal but nevertheless disposed towards protection and alleviation of hardship and ill-treatment. The same spirit of humanitarianism has been exemplified repeatedly, particularly in the form of Private Members' Bills, in measures for the protection and welfare of animals.

Egalitarian measures include the conferment of the vote on women in 1918 and more completely in 1928, the Sex Disqualification (Removal) Act, 1919, the Married Women's Property (Scotland) Act, 1920, completing the trend of earlier Acts of 1881 (Scotland) and 1882 (England) and the provision for women's work during the two Wars, first as members of auxiliary services and now as full members of the armed forces of the Crown, and their entitlement to divorce (in England only since 1923) and custody of children on an equality with their husbands. While women's suffrage resulted from the extension of educational facilities for women, it is interesting to note that public opinion was on the whole alienated by the suffragist movement and this possibly delayed the triumph of that cause. The Act of 1918 was due more to recognition of what women had done in the war than to the activities of the suffragettes.

While the Law Reform (Miscellaneous Provisions) Act, 1949, completed in England a process which had lasted from 1870 giving women the right to earn their own money, make their own contracts, and sue and be sued alone, a few traces of the wife's former servitude remain so that, for instance, a husband can in England get damages for loss of his wife's services, but she cannot for his: *Best* v. *Fox.*[29] Yet statute and decisions have given her equality in all substantial respects. Thus it has been held that each party has an equal voice in saying where the matrimonial home should be: *Dunn* v. *Dunn,*[30] and where questions of title are in doubt property is treated as between husband and wife on the basis of joint property: *Rimmer* v. *Rimmer.*[31]

Individual liberty has, however, suffered from the extension of State activities. In the old common-law sense of individual liberty, the sense of freedom from arbitrary arrest, freedom of association, and freedom of speech and worship, this century has not brought any notable changes, unless in the wartime cases where the courts showed themselves singularly willing to concede the fullest liberty of action to the Executive even where the liberty of the individual was thereby abridged: see *e.g., Liversidge* v. *Anderson.*[32] But in countless ways the progress of social legislation has restricted the unfettered liberty of the individual's action. Thus he *must* be an insured person under the National Insurance Acts; he may only send his children to work under limited conditions; he may not set up in business to supply the requirements of his fellow-citizens for coal, gas or electric power or their needs for transport unless strictly licensed; he may not, in many cases, pay his workmen less than a rate of wages arrived at by national agreements; he may sell spirits only under strict conditions. His field of choice as a consumer of goods and services is limited by monopoly trends, so that in many cases he must take what is offered him by the sole permitted purveyor of the commodity in question. Moreover, heavy national and local taxation and death duties restrict his liberty to amass or conserve any large aggregation of wealth, and the field of choice open to individual enterprise and initiative is seriously reduced.

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[29] [1952] A.C. 716.

[30] [1949] P. 98.

[31] [1953] 1 Q.B. 63.

[32] [1942] A.C. 206.

On the other hand the socialistic contention which has led to much of this restrictive legislation must be to some extent conceded, that the liberty of the individual as known in early and mid-Victorian times was a purely formal and legal concept without any real content. The single workman had no real option to refuse the terms offered by the employer when entering into a theoretically perfectly bilateral agreement. Consequently, the rise of collective bargaining and State intervention to limit conditions and restrict what was formally free competition has by restricting liberty of some or all individuals in some respects truly had a freeing influence on others. Freedom has come with greater leisure and education and increased opportunities to achieve positions previously closed by barriers of wealth and education.

The restrictions on complete liberty of personal action were in existence when Dicey wrote, but since then they have increased enormously: one need only mention the compulsory provisions of the Housing Acts, the various Wages Regulation Acts, *e.g.*, for Agriculture, 1948; the Wages Councils Act, 1948, the Holidays with Pay Act, the Industrial Court, the Factories legislation, the wartime Control of Engagement Order, the Education Acts, the Children and Young Persons Acts, which in the ultimate analysis probably do conduce to greater freedom for the development of the human personality.

It is undeniable that opinion generally has favoured this paradoxical restriction of liberty of many different persons in many different ways in the belief that it tends on the whole to the freedom of the individual to develop his personality and utilise his faculties to the best advantage.

In regard to the major social curses, drink and gambling, public opinion has influenced the law curiously little, which may reflect an increase in tolerance of these habits by way of reaction from the Victorian Puritanism. It is significant that there has been no general call for the national control of the drink trade, though there has been a small movement in this direction. The Local Veto Bill on Temperance in 1895 was unpopular and was not passed, but Balfour's Licensing Act of 1904 promoted a reduction in the number of public-houses in relation to the population, and this in conjunction with better conditions of life and education has effected a great reduction in drunkenness. So, too, much modern legislation has militated against alcoholic addiction, *e.g.*, Children Act, 1908, ss. 119–120 (now superseded by 1933 Act, ss. 5–6). In the First World War Defence Regulations also restricted sales. State management of licensed premises in the Carlisle district, introduced during that War, has been favourably commented on by the Royal Commission on Licensing, 1929–1931, and has now been extended to the New Towns. The restriction of permitted hours has in general met with approval. That Commision reported that there was a remarkable consensus of opinion in favour of restriction, and that restriction, which depended on the sanction of public opinion, was acceptable to a vast section of the public. Both legislative changes and improved social conditions have contributed to an improved public opinion regarding alcohol which increasingly regards drunkenness as offensive vulgarity in marked contrast to the public opinion of a century and more earlier.

Gambling, however, has not been so much checked, and the invention of the football pool has spread it to every week of the year and every corner of the country. Moreover, high taxation so penalises industry that a substantial prize in such a gamble is the only way of acquiring any substantial capital sum, and this form of gambling has reached the level of a national industry. Opinion is not unfavourably disposed to this, but probably rather the other way. The Royal Commission on Betting and Gambling made proposals for recognising and controlling rather than seeking to suppress betting, and probably the churches are the only bodies which maintain stubborn opposition to this vice. The lure of easy money sways the general opinion in favour of allowing gambling, and the movement of opinion has clearly been towards tolerating and recognising it. In consequence there is considerable demand for revision of the relevant portions of the Statute-book since the existing legislation dates from an earlier period and has become out of touch with the current attitude to the subject.

To the private lawyer in England, viewing in retrospect property law in the twentieth century, the property legislation of 1925 bulks most largely, but that was not a matter on which public opinion had any distinctive voice. Property law is, *par excellence*, " lawyer's law " on which the general opinion is silent and almost entirely ignorant. The topic of property law which has been affected by public opinion has been that of public control and expropriation. To generalise, there has been a marked shift and transference of *res privatae* to *res communes* or *res publicae*, and this shift is consonant with and a facet of the socialisation of the law—property is being socialised. Now this trend has its two forms, partial and complete. Partial socialisation is represented by the Rent Restrictions Acts, which confer on the tenants of most dwelling-houses a quasi-status of irremoveability for two lives, or almost a new estate in land, by the Agricultural Holdings Acts which confer a rather similar status on the agricultural tenant so long as his conduct satisfies, not the landlord, but local Agricultural Executive Committees, and the Town and Country Planning legislation, which restricts the uses a landlord may make of his property to those uses which local authorities or a national board are prepared to sanction, a sanction which may be conditional or qualified. Specific properties of land such as coal and petroleum are now vested in public authorities. But in these instances, too, the necessities of control during two wars prompted, justified and even demanded the measures in question. But opinion, abetted by circumstances, approves their continuance.

The more complete socialisation is represented by the great extension of powers of compulsory purchase. Compulsory purchase was first met with in Britain in the railway statutes of the nineteenth century, and as early as 1845 the Lands Clauses Acts provided a general procedural measure. But only in the twentieth century has compulsory purchase become normal, and now every kind of authority is armed with powers to acquire land, and new codes, such as the Acquisition of Land (Authorisation Procedure) Act, 1946 regulate the mode of its taking. And taking there has been everywhere on a large scale, for housing, schools, factories and defence establishments.

In personal or moveable property the same trend has been visible, clearly exemplified in the sharp rise in death duties. In 1894 they began and were not significant in the last years of collectivism. From the early years of the period of Socialism their importance has grown and the rates have increased, so that today moderate estates are mulcted of their 8, 10 or 12 per cent., and in the case of larger estates proportions up to 90 per cent. may fall to the Exchequer. Certain shades of opinion vociferously support this trend.

Parallel to these movements has been the trend towards public control of utilities and services, so that to a steadily decreasing extent can an individual or company develop a public utility service as a profit-making organisation. This movement dates from the period of collectivism, and in the form of municipal socialism was one of the foremost tenets of the Fabians in the last fifteen years of the nineteenth century. Municipal enterprise extended enormously from about 1880 as part of the drive to improve the conditions of life in towns. Baths and wash-houses, museums, public libraries, parks, gardens, open spaces, allotments, lodging-houses, tramways, gas, electricity and water undertakings were in many places municipalised and maintained out of rates. The nationalisation of gas, electricity, water and transport effected in 1946–1948 was thus merely the extension of an old principle, and the gathering up into a coherent system of previously disunited and sometimes overlapping services.

During both World Wars large powers of expropriation were vested in the Government and particularly since 1945 there has been in fact little relaxation of these powers. It is significant that powers of requisition and expropriation granted only for a year at a time during the height of the Second World War were taken for five years at a stretch by the post-war Labour administration, twice extended in scope and then made permanent. A wide power of expropriation in the public interest is now accepted as a normal concomitant of Government power. The saying that an Englishman's home is his castle carries no weight against the power of the Executive and most people seem content that it should be so.

There is no doubt that the trend of opinion as expressed in legislation has thus been strongly favourable to the transference of assets, powers and services to community or public control. Whether public opinion can exercise any control over them after their transfer is problematical as Parliament declines to interfere in the day-to-day administration of the nationalised industries. The statutes establishing the boards of these national utilities provide for various advisory committees to give independent advice to the responsible Minister on behalf of the general public, or of such groups of the public as are particularly interested in the enterprise in question, in particular of the consumers of its products. Experience hitherto suggests that these committees have been insufficiently critical of the organisations: the more independent they are of the Board the closer they are likely to be to public opinion. Control by public opinion through Parliament is so nebulous as to be non-existent, and Parliament has not yet seriously grappled with the problem of scrutinising the working of the monsters it has created.

In the same way the anti-social use of property is being increasingly checked, as by the investigations of the Monopolies Commission, and provisions in recent Patents legislation, and most notably by the vigorous control exercised under the Town and Country Planning Acts.

Public Opinion and Judicial Decisions

The decision of litigated cases before the regular courts is not a matter on which the general public opinion has any direct influence. The prestige and independence of the Bench in this country is such that it can within the limits of the law ignore and defy any kind of popular clamour or agitation. Where public opinion has come to be crystallised in legislation, that legislation, of course, binds the judges notwithstanding any private feelings to the contrary. The influence of the narrower but more influential opinion of the profession and the jurists is moreover a factor which, in the twentieth century more than previously, has influenced judicial thinking. More deference is paid to the writer of textbooks and even to articles in learned periodicals than used to be and in cases of broad principle the courts now quite frankly canvass such views.

But equally important though more difficult to discern is the influence exercised by the fact that judges are men of their generation and cannot but have been affected by the prevailing general trends of social, economic and political philosophy. The fact that political service is an avenue to the Bench involves that many judges have well-known political views, and the remainder can hardly avoid having such views even though they may not have been proclaimed by them in the past, or may not be so well known. Since the prevailing social and political philosophy of the years since 1900 has been socialistic in greater or less degree as distinct from individualistic philosophy of the past, it is only to be expected that this tendency should have been apparent in judicial decisions. And it is right that this should be so. "It is the function of the courts to keep the doctrines up to date with the *mores* by continual restatement and by giving them a continually new content." (Cardozo, *Nature of the Judicial Process*, 135, quoting Corbin.) But as judges do not attain to high judicial rank until they are men of mature years, their basic views have been formed many years earlier, and this and also respect for the great existing body of law and decisions, the restrictions imposed by the doctrine of precedent and the desire to preserve the consistency of the law, all tend to induce a conservative spirit which does not strive for radical developments.

The Labour and Trade Union movements have long been rather suspicious of the attitude of the courts towards workmen, strikes, unions, tenants and "the underdog" generally. That this attitude was justified in the eighteenth and nineteenth centuries is undoubted, but it is much more questionable today. It is all too easy for a disappointed litigant to question the motives of the judge when a judgment issues against him, and it is trite that judges in general belong, if not originally at least in their later years, to the upper social classes of the community and tend to retain the prepossessions of their class. But to take the attitude that it is justice only when a workman recovers damages or a tenant defeats the landlord's claim for possession takes all significance out of the law.

Looking at various fields of private law over a longer period it is quite apparent that judicial opinion has moved generally conform to the main current of moderate and informed public opinion and social philosophy, and has in general sought within the framework of existing law and authoritative decisions to reshape and restate rules to accord with more modern views (and it must not be forgotten that in many cases the creative activity of the judges is severely limited by the rules of precedent and the existence of previous contrary practice). Thus the doctrine of common employment was recognised by the last years of the nineteenth century as unjust, founded on erroneous premises, rejected by public opinion, and unsuited to a developing industrial community. The courts could not sweep it wholly away but could only, as they did, restrict its operation by extending the doctrine of common interest in the carefulness of the fellow servant,[33] while simultaneously they built up an insistence on the fundamental and non-delegable duties of the employers to provide safe plant, safe premises and competent staff, which was finally restated in *English* v. *Wilsons & Clyde Coal Co.*[34] These principles restricted common employment at a narrower range of cases. Hence, when in 1948 the doctrine was abolished by a statute (Law Reform (Personal Injuries) Act, 1948) the change had not only the support of workmen, but of Bench and Bar. Moreover, the doctrine had been so established that nothing short of statute could have eradicated it: the courts were not keeping it alive because they wanted to, but because they had no option, standing the doctrine of precedent.

Again the same period has seen a great development and extension of the imposition by statute on employers of stringent provisions designed to protect the health and safety of their employees. Judges of an older generation would almost certainly have interpreted such provisions so as to import the common law requirement of fault as a requisite of liability or have modified the duties of care by the qualification " so far as reasonably practicable." But the courts of the twentieth century have in general resisted such arguments and have not shrunk from saying that the statutes in many cases impose an absolute liability on the employer, such that the happening of an accident proves failure in his duty of care and imposes liability. It is possibly instructive to compare the well-known state of the law relating to safety in mines and factories in the early and mid-nineteenth century with the numerous safety provisions of the Coal Mines Act, 1911, which have to be implemented " so far as reasonably possible " and with the absolute duties under the Factories Act, 1937. The Monckton Committee on alternative remedies recommended[35] that an employer should be given the defence to an action for breach of statutory duty under the latter Act that he had done all that it was reasonably practicable to do to ensure compliance with the statute, but this clause was dropped from the Law Reform (Personal Injuries) Bill at the instance of trade union interests, who objected to any reduction of safety provisions. Probably the high-water mark of the liability of the employer was expressed by Salter J. in *Davies* v. *Owen*[35a] where he said with regard to the fencing of dangerous machinery in a factory that " if a machine cannot be securely fenced while remaining commercially practicable or mechanically useful, the statute in effect prohibits its use." But in *Lewis* v. *Denye*,[35b] the House of Lords expressly reserved their opinion on this point. While such a strict view of the law may make employers and their insurers very vigilant as to safety measures, it results in some very hard decisions, and hard cases still make bad law, even if they please trade union interests.

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[33] *The Petrel* [1893] P. 320; *Radcliffe* v. *Ribble* [1939] A.C. 215.

[34] 1937 S.C.(H.L.) 46; [1938] A.C. 57.

The courts have also regarded less favourably such a plea as *volenti non fit injuria*, which is philosophically redolent of individualism and freedom of contract. The plea was much curtailed by *Smith* v. *Baker*,[36] and more recently the courts have completely refused to apply the principle to the clearest cases of voluntary assumption of risk where that assumption was actuated by a meritorious motive, such as to save life,[37] or property.[38] The defence of *volenti* has now become so attenuated as almost to have disappeared. So, too, in the field of contract they have elaborated the principles by which a contract by an employee retaining his future employment is void except in special cases. In this department of the law the attitude of the courts has been powerfully influenced by changing views of what is desirable in the public interest: see *Attwood* v. *Lamont*.[39] Public policy changes with different economic and social conditions and views. The modern law was mainly stated in *Mason* v. *Provident Clothing Co*,[40] to the effect that restraints are prima facie void unless shown to be reasonable in the circumstances, and it is harder to show this in the case of restraint on a servant leaving employment than upon the seller of a business.

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[35] Cmd. 6860 of 1946.

[35a] [1919] 2 K.B. 39.

[35b] [1940] A.C. 921.

[36] [1891] A.C. 325.

[37] *Haynes* v. *Harwood* [1935] 1 K.B. 146.

[38] *Hyett* v. *G. W. Ry.* [1948] 1 K.B. 345; *Steel* v. *Glasgow Iron and Steel Co.*, 1944 S.C. 237.

The courts have also shown a willingness to subject the newly developed social institutions to fairly strict liability. In the olden days of the voluntary hospitals various subterfuges were resorted to in order to avoid making a voluntary and charitable institution liable for the delicts or torts of its staff. Thus it was suggested that the voluntary hospitals existed only to bring persons in touch with qualified assistance and did not set out to treat patients; or the distinction was taken between the exercise of professional skill and the execution of merely administrative duties with liability falling on the hospital for negligence only in the latter case: *e.g.*, *Hillyer* v. *St. Bartholomew's Hospital*[41]; *Reidford* v. *Aberdeen Magistrates*.[42] But in later years the tendency has been visible particularly in England to subject the hospitals to liability for the negligence of even professional staff. Finally in *Cassidy* v. *Ministry of Health*,[43] the Court of Appeal held the hospital authority liable for the negligence of full-time staff, notwithstanding that the negligence arose within the sphere of exercising professional care and skill, and a similar view was taken by the Court of Session in *Hayward* v. *Glasgow Western Hospitals*,[44] nominally on the view that the coming into force of the National Health Service legislation had radically changed the former relationship between a hospital and its full-time staff on the one hand and the patient on the other. In fact the decision was prompted as much by the consideration that vicarious liability of public authorities for the misdeeds of employees, even when they be professional men acting within the scope of the exercise of their professional skill, is now normal, and there seemed no sufficient reason why an exception should be made in this one case.

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[39] [1920] 3 K.B. 571, 581.

[40] [1913] A.C. 724.

[41] [1909] 2 K.B. 820.

[42] 1933 S.C. 276.

[43] [1951] 2 K.B. 343.

[44] 1954 S.L.T. 226.

The creative function of the courts has operated on not dissimilar lines. The great decision of the period, *Donoghue* v. *Stevenson*,[45] imposed a very far-reaching responsibility on manufacturers and suppliers towards not merely their immediate customers, but to the eventual consumers and the general public. The decision is comparable to the increasing statutory demands for purity of food and drugs. The limits of this principle are still undefined but it has shown great capacity for development. It cannot however be inferred that the courts have shown excessive zeal to develop existing principles so as to impose liability where it did not exist before. Thus in both England and Scotland the courts declined to extend the principle of *Donoghue's* case at the expense of narrower principles in *Candler* v. *Crane, Christmas & Co.*[46] and *McPhail* v. *Lanark County Council*[47] respectively. Again the House of Lords declined in *Read* v. *Lyons*[48] to make a possible and not unreasonable, though stringent in effect, extension of the rule in *Rylands* v. *Fletcher*.[49] Again neither precedent nor long usage was allowed to stand in the way of the manifest needs of justice when in *Fibrosa* v. *Fairbairn*[50] the rule in *Chandler* v. *Webster*[51] was overruled.

Reference has already been made to the very significant growth of the power of the Executive in the years since 1900. The attitude of the courts to this phenomenon has been remarkable: as the power of the Executive has grown, so that of the courts has diminished and their ability and freedom and right to protect the individual against the overmastering Executive has shrunk. In part it has been filched away by the legislature in conferring powers on Ministers and Departments in terms so vague and wide as to be beyond challenge, or even by providing that a statement or certificate by the Minister shall be conclusive or by making appeal lie to the Minister or to one of his subordinates, but in part it has been relinquished by courts themselves who seem to have abdicated their traditional functions of vindicating the rights of the individual against the State. The concession by the Executive in the Crown Proceedings Act, 1947, of liability to individuals has been balanced by the attitude of the courts, so much so that the protection they afford to the citizen can now be compared unfavourably with that afforded by the Conseil d'Etat in France.[52] Particularly since 1914 the courts have shown themselves more willing to recognise the great powers conferred on the executive departments and to accept that Ministers and public authorities may be safely entrusted with discretion not liable to the review of the courts.

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[45] 1932 S.C.(H.L.) 31; [1932] A.C. 562.
[46] [1951] 2 K.B. 164.
[47] 1951 S.C. 301.
[48] [1947] A.C. 156.
[49] (1868) L.R. 3 H.L. 330.
[50] [1943] A.C. 32.
[51] [1904] 1 K.B. 493.

Repeatedly in recent years the courts have held that the investigation of reasons for a course of conduct or the exercise of a ministerial discretion is a matter for Parliament only. In *Liversidge* v. *Anderson*[53] the House of Lords went very far, even for wartime, in accepting the certificate of the Executive that it had acted with " reasonable cause " and in denying the judiciary any right to inquire into the justification for the appellant's detention (though this has to a small extent been limited by observations in the later case of *Nakkuda Ali* v. *Jayaratne*.[54]

This trend is seen significantly in relation to the discovery of documents. A Minister may, and in modern practice invariably does, claim privilege against disclosure of any papers in the custody of his Department, not merely in their own right but because they belong to a specified category of documents. See *Duncan* v. *Cammell Laird*[55] and *McKie* v. *Western S. M. T. Co.*[56] And while the courts still pay lip-service to the principle that they may overrule a Ministerial objection and order disclosure of the papers in question, this never seems to be exercised, and in fact they meekly accept the claim of privilege when there seems to be no ground at all for believing that any public interest is involved in the disclosure of the papers in the case, and even when the judges are clearly sceptical of the existence of grounds for claiming the privilege, as in *Ellis* v. *Home Office.*[57] By this procedural means an individual litigant may well be hamstrung. He cannot establish his case without the evidence of the Ministry files, which the Ministry refuse to disclose. This attitude of abnegation by the courts of their old function has gone far to destroy any claim that they are any protection against absolutism, and to reduce the Rule of Law to an antiquated fiction, while recent happenings, the Crichel Down affair and the Pilgrim case, have shown how cruelly individuals can be wronged by the exercise of powers beneficent in intention.

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[52] Hamson: *Executive Discretion and Judicial Control.*

[53] [1942] A.C. 206.

[54] [1951] A.C. 66.

In the interpretation of legislation designed to effect purely social welfare purposes, such as town planning, the tendency has there clearly been not to restrict the social purpose expressed in the Act but to recognise the administrative discretion required to effectuate it, provided it goes through the procedure requisite under the Act in question. Thus in *Franklin* v. *Minister of Town and Country Planning*[58] it was held that after objections have been made to a new town order the Minister's duty is not judicial or quasi-judicial, but purely administrative, so that considerations of bias in the execution of his duty were irrelevant, and the sole question was whether or not he had genuinely considered the report of the official instructed to hold an inquiry into the objections, and there was no evidence (and probably could be none) that he had not considered it. In the series of such cases the courts uniformly declined to attempt to restrict policy and the administrative discretion of the responsible Minister. Justification of his course of action had to be sought in Parliament and not in the courts, which in effect means that his action is virtually unchallengeable.

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[55] [1942] A.C. 624.
[56] 1952 S.C. 206.
[57] [1953] 2 Q.B. 135.
[58] [1948] A.C. 87.

Only occasionally and exceptionally have there been examples of judicial insistence on an older individualistic interpretation in face of statutory authority, as in *Roberts* v. *Hopwood*,[59] where the House of Lords insisted on reading an overriding requirement of reasonableness into a statutory discretionary power to pay wages, and this rather prejudiced decision has not been followed. In other cases, such as *Monk* v. *Warbey*[60] and *Summers* v. *Salford Corporation*[61] the decision was quite openly arrived at by regarding the social object of the statute in question and this is clearly the general modern view.

In much the same way the courts have not been willing, as they were earlier, to take advantage of any and every procedural slip to denounce the exercise of statutory powers as a nullity. Procedural provisions receive a fair and not unduly critical interpretation (*cf. Macmillan* v. *Inverness County Council*[62]).

Similarly the trend of interpretation in other social legislation, such as housing and slum-clearance statutes, has been generally in a direction less prejudiced in favour of the property owner and more in favour of the social welfare object of the legislation. The older attitude was that any interference with vested rights or alteration of the common law had to be strictly construed and given no greater scope than the words demanded. Thus in 1927 in *Morgan* v. *Liverpool Corporation*[63] it was held in relation to a statutory obligation on the owners of houses below a specified rateable value to keep the house " in all respects reasonably fit for human habitation " that the standard of repair envisaged was a modest one and that the breaking of a sash-cord did not prevent the house from being in all respects reasonably fit. Furthermore the statute was construed as importing a term to the stated effect into the common law relationship of landlord and tenant so that the landlord's liability was, in accordance with common law principles, conditional on his having been given notice of the defect. But in 1943 (*Summers* v. *Salford Corporation*[64]) the House of Lords, though the point as to notice was left open, repudiated that attitude on the first point, and held that the statute, the scheme of which was said to be analogous to the Factories Acts, must be construed so as to give proper effect to its object which was to reduce the evils of bad housing accommodation and to protect working-class people by a compulsory provision from accepting improper living conditions. However, in *McCarrick* v. *Liverpool Corporation*[65] *Morgan's* case was followed to the extent that the landlord was not to be liable in the absence of notice by the tenant of the defect.

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[59] [1925] A.C. 578.

[60] [1935] 1 K.B. 75.

[61] [1943] A.C. 283.

[62] 1949 S.C. 77.

[63] [1927] 2 K.B. 131.

This attitude is clearly more calculated to give effect to the general underlying purpose of legislation than is the older narrow interpretation based on the view that Parliament usually changes the law for the worse, and it thereby more closely reflects the public opinion evidenced in the parliamentary majority which passed the legislation in question. The attitude in statutory interpretation has in fact turned in recent years " from an attitude of hostile neutrality to one of sympathetic collaboration. "[66] It gives effect to the prevailing general opinion and social philosophy which imposes heavy liability on employers, occupiers of factories, and landlords and reduces their position to one of acute difficulty. This attitude is undoubtedly socialistic, but the courts have not shrunk from it.

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[64] [1943] A.C. 283.

[65] [1947] A.C. 219.

[66] Friedmann, *Legal Theory*, 3rd ed., 314.

A generally similar attitude may be found in relation to the interpretation of taxing provisions. Taxation is now conceived both as a means of raising money necessary for the services of the country and also as a means of redistributing national wealth. Hence attempts to evade the proper burden of taxation have been receiving less favourable treatment from the courts than formerly, when the attitude was that taxation was an evil which could legitimately be avoided by any expedient falling outside the exact terms of the taxing statute. Thus in *Levene* v. *Inland Revenue Commissioners*,[67] a Jew who had resided abroad for an average of twenty weeks in each of five fiscal years was held to be resident in Britain for the purposes of the Income Tax Acts. Viscount Sumner pointed out that subjects incurred no penalties and, strictly speaking, no moral censure if they made it their business to walk outside the letter of taxing statutes but that nevertheless the Commissioners had justifiably held Levene "resident." This marked the beginning of the "social conscience" attitude of the courts towards tax evasion. Again in *Latilla* v. *Inland Revenue Commissioners*[68] it was pointed out that while taxpayers were entitled to avoid taxation by artificial expedients, it was not "a commendable exercise of ingenuity or a discharge of the duties of good citizenship" for success increased the burden on the shoulders of good citizens who did not desire or know how to adopt these manoeuvres.

On the other hand in *Vestey's Executors* v. *Inland Revenue Commissioners*[69] the court held that a very circuitous arrangement effected under a trust designed to escape taxation was not caught by even certain broadly expressed provisions and this decision marks a slight reversion to the older doctrine though it remains true that tax evasion is less favoured than in the past.

Clearly then legal judgments and the trend of judicial decisions have been moving conformably to the general movement of social evolution and public opinion. The courts have moved in accordance with, but not in advance of, generally accepted public opinion and the broad trends of legislative policy of the major political parties. They have rightly not ventured far in advance of social thinking or made radical innovations but yet have not shrunk from substantial developments; natural conservatism, respect for precedent and the existing fabric of the law and legal caution, have restrained rashness or boldness in shaping legal doctrines, but a lively awareness of the demands and interests of the times has aided a steady advance. If one looks at the law of the 1950's and compares it with that of the 1900's the contrast is plain, and the movement has unquestionably been in a direction which we have called socialistic, accepting State intervention, imposing responsibility to employees, tenants, consumers and dependent individuals for the general benefit and their own protection, restricting outworn legal doctrines, and recognising possibly rather much the primacy of the State in modern Britain as the initiator, director, controller and accomplisher of manifold tasks, vested of necessity with many, wide and vague powers.

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[67] [1928] A.C. 217.
[68] [1943] A.C. 377.
[69] [1949] 1 All E.R. 1108.

The action of the courts has not been without its influence on public opinion and law-making. " Criticism of the law by the judges is a source not to be discounted. Observations by them may form an important basis of public opinion. . . . If matters come before them where injustice is being done, they are entitled to point it out so that the public may know of it and form an opinion on it." [70] Thus the immunity of the Crown and its Departments from action *ex delicto* had long been a source of complaint and a Bill had been drafted in 1927 to meet the situation. The growth of the scope of the activities of Crown Departments, particularly during the Second World War, made the matter more urgent but what finally precipitated reform was the decision of the House of Lords in *Adams* v.

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[70] Denning, *The Changing Law*, 13–14.

Naylor.[71] In that case the House repudiated the practice which had grown up in lower courts of accepting as nominal defendant, in lieu of the Department which could not be directly sued, an official of the Department, the Crown as a matter of grace indemnifying him against all damages and costs awarded against him. This fictional expedient was coming to be accepted: its repudiation focused attention on the problem and made legislation an immediate necessity.

This decision was followed in *Royster* v. *Cavey*[72] and it was apparent that public opinion would not tolerate the immunity of Government Departments any longer. In consequence the Crown Proceedings Act, 1947, was passed, based on the Bill of 1927. The action of the Lords had achieved in a year or two what twenty and more years of complaint by jurists had not done, simply because it pointed to a state of affairs recognised as no longer tolerable, and opinion in the country focused in Parliament speedily effected the requisite change in the law.

Equally the progress of law has tended to condition public opinion. The general success of controls and legislation beneficial to the working classes has been such that they and their representatives in Parliament demand more and more legal control in the same interest, so that there is a childlike belief in the ability of legal changes to promote the greatest happiness of the greatest number. The public has come to accept a mass of controls and restrictions quite incredible in Victorian times. Again the circumstances of two wars more than anything else brought this about, but the crisis being past, opinion in the country generally has become conditioned to legal regulation in manifold spheres and to the enormously increased power and influence of the central government.

Changes in Social Philosophy

The general character of this period which we have called the Period of Socialism is clearly visible in the general trends of social and political philosophy in the period. The salient characteristic is the enormous increase of State intervention and activity, the demand by public opinion that the State should undertake responsibility for a great variety of activities previously considered as wholly outwith its scope and the willingness and even active desire of Parliament to assume these manifold functions and exercise them by the creation of new Departments of State, by greatly increasing the duties of local authorities, and by establishing new *ad hoc* boards, commissions or public corporations. The State is looked to for everything.

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[71] [1946] A.C. 543.

[72] [1947] K.B. 204.

In 1905 Dicey[73] noted as the characteristic forms of collectivism (i) State protection of the weak ; (ii) curtailment of the area of contractual freedom ; (iii) the preference for collective action ; and (iv) the equalisation of advantages, in (a) education, (b) employer's liability, and (c) municipal trading. All these trends have been continued and vastly accentuated in the years since then. To them have been added the nationalisation of certain basic industries, with resultant expropriation of the former operators, the enforcement of greater equality of income by statutorily fixed minimum wages at one end of the scale and very high taxation at the other, the provision of manifold services paid for largely by taxation and not directly by the consumer, as in the case of health and welfare, hospital and dental services, and subsidised local authority housing, or controlled rents.

This movement has to a considerable extent been an enforced consequence of conditions, particularly the two World Wars and the depression of the 1930's, but it has been hastened and accentuated by a greatly increased electorate which natually has sent to Westminster members pledged to reforms designed to benefit their electors. Not least was the continuing swing away from the *laissez-faire* philosophy of the mid-nineteenth century. Harcourt's dictum " we are all Socialists now " is entirely justified. " The old forms of militant Imperialism and Conservative

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[73] *Op. cit.*, 259 *et seq.*

Unionism were never again to hold power [after 1906]. . . . The Conservatism that came back during and after the [first] World War has been liberal . . . and semi-Socialist in its conception of the duties of the State to the working-class." [74] The victory of the Labour Party in 1945 marked only a stage in movement, not a complete change, not a radical departure from prior policies but an increase of speed and emphasis in the movement towards Socialism. The antithesis is not between *laissez-faire* individualism and radical Socialism, but between more and less socialistic measures, and the Conservatives of today are not those who would abolish public enterprise or public provision of social services but those who merely want less socialism and governmental action than do the Labour Party. No one suggests a return to pure *laissez-faire* and complete individualism. That philosophy is dead and there is no present sign of a revival.

In the twentieth century too what we now call the "social conscience" has been particularly active, that is, the increasing general awareness on the part of the community generally of the difficulties under which a large part of the community laboured, in large part a legacy of the first century of the Industrial Revolution, and the acceptance of communal responsibility for the mitigation and abolition of these evils and of their causes. This has given rise to a social philosophy in which the unit is not the individual but the whole community. The "social conscience" may be said to date from about 1875, though there had been earlier awareness of social problems of housing and health. "Not only Socialists but Society as a whole had become interested in the inquiry into the state of the 'submerged.' From 1884 onwards, Commissions on Sweated Trades and on Housing, sometimes with the Prince of Wales as chairman, examined depths hitherto unplumbed. Investigation was the watchword of the hour, and the results were not consoling. It was the era of Canon Barnett and the 'Settlements.' . . . Charles Booth's scientific study of the London Poor . . . did much to enlighten the world and to form opinion . . . [He] put the demand for old-age pensions on a scientific basis.

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[74] Trevelyan, *British History in Nineteenth and Twentieth Centuries*, 402, 440.

"The fight against sweating, bad housing, neglect of children and aged persons, and all the problems of poverty had to wait for some of its most signal victories till the new century, but the ground was chosen and the battle was joined in the last decades of Victoria's reign." [75]

The view that the community in general has some responsibility for bad social conditions such as bad housing, unduly low wages, "sweated" trades, bad health, education, poverty and unemployment was enthusiastically taken up by the Labour Party and indeed to some extent provided the justification for its foundation. As in other spheres the movement has been from *laissez-faire* individualism to collective action to mitigate evils, and so necessarily to a substantial degree of Socialism.

This constitutes a decisive shift in public opinion, and hence today the legislative policy of all major parties rejects unmitigated economic individualism. The State is held responsible for creating conditions of stable and full employment; it accepts responsibility for minimum standards of living, housing, labour conditions and social insurance. Some degree of socialisation and control and public operation of industries and natural resources is recognised by all major parties though there is controversy as to the degree of public controls. Not least the state of partial or complete mobilisation of resources for war purposes which has lasted since 1914 necessarily entails an increasing measure of Government control over manpower and resources, over scientific research and the location of industries, over priorities in employment, the conservation of vital national assets, such as forests or waterways or roads, and a multitude of other activities.

In consequence the planned social Welfare State is an irrevocable reality: no party could demolish the edifice created since the beginning of the century. Modern government *must* discharge innumerable social functions, beyond its ancient and primary ones of defence and the administration of justice. All that is now expected, and indeed demanded of it, by the body of citizens, however much some individual members may deplore and deprecate it. They are swimming against the tide which has set in a socialistic direction and in full flood, inundating the old areas of individualism and liberalism, and the general public opinion expressed through parliamentary activity is the main force behind this tide. The Macmillan Committee on Finance and Industry[76] reported in 1931: "The most distinctive indication of the change of outlook of the Government of this country in recent years has been its growing preoccupation, irrespective of party, with the management of the life of the people. A study of the Statute-book will show how profoundly the conception of the function of government has altered. Parliament finds itself increasingly engaged in legislation which has for its conscious aim the regulation of the day-to-day affairs of the community and now intervenes in matters formerly thought to be entirely outside its scope. This new orientation has its dangers as well as its merits. Between liberty and government there is an age-old conflict. It is of vital importance that the new policy, while duly promoting liberty by securing better conditions of life for the people of this country, should not, in its zeal for interference, deprive them of their initiative and independence which are the nation's most valuable assets."

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[75] Trevelyan, *op. cit.*, 400.

But while profound changes have been effected in public law, resulting in the growth of a vast field of administrative law, the results of public opinion on private law have been small in comparison. It is not the case that private law has remained static since 1900, but it has certainly not changed to anything like the same extent as public law. The influence of public opinion has been evident in much the same way as in public law, exercising a general influence in the direction of equality, in protecting the underprivileged and the dependent, but there are chapters of the law which show no material movement either under the influence of public opinion or otherwise. Thus wills and trusts, conveyancing (unless in England under the property legislation of 1925), and much of the law of contract show little result of the external changes. But in tort or reparation the sympathy for the injured employee has powerfully influenced the law.

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[76] Cmd. 3897, pp. 4–5.

It is, of course, in the highest degree desirable that law should conform to the moderate and general public opinion of the community. "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong." [77]

Two consequences necessarily follow from the decisive shift of opinion and of legislation towards a planned State and a socialistic community, the sharp decline in the scope for initiative and individual liberty or responsibility, and secondly, the enormous increase of taxation and Government expenditure, partly to pay for expensive schemes of social welfare and amelioration and partly to redistribute income. Dicey viewed the beginnings of these with pessimism.[78] Their increase and continuance still give rise to pessimistic forebodings but that involves matters not merely legal but social, economic and political. The movement of law and opinion since 1900, however, gives no ground for thinking that this tendency will be reversed. Both have moved increasingly and at a hitherto increasing rate in a socialistic direction, but it may be that a period of comparative equilibrium will follow wherein these great changes can be absorbed and society and its legal system settle down to the more effective working out of the fundamentally new principles of social organisation introduced in these fifty years.

DAVID M. WALKER.

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[77] Holmes, *The Common Law*, 41.

[78] *Op. cit.*, lxxxii and lxxxvii.

REVOCATION OF LICENCES—AN ENGLISH DILEMMA

THE PROBLEM STATED

THE control of administration in England is today a problem of very great delicacy. It is widely felt that there is no proper judicial supervision over the actions of Ministers of the Crown, executive officials and administrative tribunals and bodies. There is no uniformity of such persons, tribunals and bodies either as to procedure, powers or methods of appeal, and there is no counterpart of either the French *droit administratif* or the American Administrative Procedure Act, 1946.[1] The Conservative Party Manifesto in the recent General Election included a pledge to reform the administrative law, and a Committee of Inquiry is at present sitting upon this matter. Conservative Members of Parliament, who are also lawyers, in their pamphlet " Rule of Law," propose, generally, an adoption of some of the points of both the French and American systems, and in particular the setting up of a new Administrative Division of the High Court to take its place beside the present Queen's Bench Division, Chancery Division and Probate, Divorce and Admiralty Division, as set up by the Judicature Acts, 1873–1875. This new Administrative Division would hear direct appeals from administrative tribunals, whose procedure would have been standardised. It is not the purpose of this article to criticise this suggestion or to hazard any guesses about its result, but to attempt to show that there is no necessity for this revolutionary step. The writer proposes to re-examine two recent cases,

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[1] 60 Stat. 237 (1946) 5 U.S.C., ss. 1001 *et seq.* (1946). See, *e.g.*, A. V. Dicey's *Law of the Constitution*, 9th ed., by E. C. S. Wade, pp. 373 *et seq.*, and Wade's Appendix to the book, ss. 1 and 2; also Sir W. Ivor Jennings, *The Law and the Constitution*, 2nd ed. (1938); and C. J. Hamson, *Executive Discretion and Judicial Control. An Aspect of the Conseil d'Etat.*

Nakkuda Ali v. *Jayaratne* and *R.* v. *Metropolitan Police Commissioner, ex p. Parker*,[2] which appear seriously to limit judicial control by means of the order of certiorari, and to show that the scope of certiorari is in fact much wider than it would seem. The eminent British Columbian lawyer, Mr. D. M. Gordon, Q.C., writing in 1954,[3] has drawn attention to these cases, and has argued powerfully against the correctness of the decisions in them, and it is hoped that the fresh evidence from English case-law herein produced will re-establish the true purpose of certiorari.

In both the cases concerned the decisions of officials to withdraw licences to trade or to drive a taxi-cab were held, in effect, not to be judicial decisions, and thus exempt from judicial review. *Nakkuda Ali's* case was an appeal to the Privy Council from the Supreme Court of Ceylon. The Controller of Textiles in Ceylon had cancelled the appellant's textile licence under his powers as contained in regulation 62 of the Defence (Control of Textiles) Regulations, 1945, *i.e.*, " where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer." The appellant obtained from the Supreme Court of Ceylon a rule nisi directed to the respondent, requiring him to show cause why a mandate in the nature of a writ of certiorari under section 2 of the Courts Ordinance[4] should not be issued to him for the purpose of quashing his order of cancellation. The Board (consisting of Lords Porter, Oaksey and Radcliffe, Sir John Beaumont and Sir Lionel Leach) determined that there was sufficient evidence to justify the revocation, even if the mandate lay: and the Controller had in fact heard the evidence through correspondence. But the judgment went on to assert *obiter* that the Controller's powers were not judicial, and that he need hold no hearing before revoking a licence, and that he was not therefore subject to the mandate's control at all. Had the Controller been acting as a tribunal to determine whether the dealer was fit to continue as a dealer or not, weighing up the pros and cons, there would have been a place for argument as to the existence or otherwise of grounds for the mandate, but he was acting purely as an executive official, which put him outside the scope of the mandate altogether. The facts of the *Parker* case are similarly simple. The London Cab Order, 1934, under its governing statute, the Metropolitan Public Carriage Act, 1869, delegated the power to revoke cab-drivers' licences to the Metropolitan Police Commissioner. Mr. Parker had applied for a certiorari because the Commissioner had revoked his licence without any proper hearing, but the Divisional Court held that the Commissioner was, by implication, unfettered in his powers of revocation, that he was acting as an executive official, not as a tribunal, and thus was entitled to revoke licences *ex parte*, and that in any case there was no order or record which could be the subject of a certiorari and brought up to be quashed.

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[2] [1951] A.C. 66 and [1953] 1 W.L.R. 1150. It is curious that the latter case only found its way into Volume 1 of the *Weekly Law Reports*, and not into the *Law Reports* themselves.

[3] " The Cab-Driver's Licence Case," 70 L.Q.R. 203 (1954). See also S. A. de Smith, " The Right to a Hearing in English Administrative Law," 68 Harv. L.R. 569 (1955), which contains an interesting account of the development of the *audi alteram partem* rule, and a useful comparative discussion of the subject in a wide sense.

[4] The " mandate in the nature of a writ of certiorari " is provided as a parallel to the English order of certiorari by the Courts Ordinance, s. 42, because the law of Ceylon is Roman-Dutch and does not include a system of prerogative orders. English rules of common law were held to apply in Ceylon in this case to ascertain in what circumstances the Supreme Court of Ceylon might be moved for the issue of the mandate.

It is submitted that Mr. Gordon has answered the points raised by these decisions most effectively, but a passage in his article leads us to believe that a further line of cases might be considered as persuasive. He says [5]:

> " An administrative tribunal deals largely in privileges, not in legal rights; but still it cannot proceed *ex parte*. If a cab-licence is a privilege, so too is a liquor-licence. But would anyone claim that that could be revoked arbitrarily and without any hearing? A privilege of this kind is just as much a right of property as

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[5] At p. 210.

> something given irrevocably; it differs only in degree, not in kind."

A number of exemptions from the operation of certiorari, some imposed by the courts,[6] and some by statute,[7] have been apparent during the last two or three centuries. But perhaps the most interesting apparent exemption is that of the decisions of licensing justices. Before studying this apparent exemption it is important to realise the fundamental nature of certiorari in English law. This is well illustrated by the colourful and dogmatic utterance of Lord Holt C.J. in 1699[8]:

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[6] *R.* v. *Lediard* (1751) Say. 6: the warrant of a justice of the peace was held to be a ministerial, and not a judicial, act; similarly, *R.* v. *Lloyd* (1783) Cald. 309 (an order of sessions to employ a lawyer to prosecute a justice for crimes committed during his duty). *Cf. R.* v. *Aberdare Canal Co.* (1850) 14 Q.B. 854: commissioners settling questions between a canal company and landowners perform judicial acts, and thus will be liable to the control of certiorari; and *Hope* v. *Evered* (1886) 17 Q.B.D. 338: a magistrate granting a search warrant in the case of an allegation that a woman had been detained for immoral purposes also has to act judicially.

Certiorari will not lie to an ecclesiastical court, probably because the law administered by the tribunal is exotic, and the High Court would have no standards for examining the adjudication: *R.* v. *Chancellor of St. Edmundsbury and Ipswich Diocese, ex p. White* [1947] K.B. 263; [1948] 1 K.B. 195. There are some unsatisfactory aspects of this decision: see Mr. Gordon's article "Certiorari to an Ecclesiastical Court," 63 L.Q.R. 208 (1947). Writs of certiorari have, however, issued to bishops, calling upon them to certify to the common law courts or to Chancery matters peculiarly within the knowledge of the bishop, such as a list of the incumbents in a parish, whether a parson who has pleaded benefit of clergy in a criminal case is in fact a clerk, etc.: [1948] 1 K.B. at p. 204, *per* Wrottesley L.J., who quotes a number of authorities contained in Fitzherbert's *Natura Brevium*, p. 246, Co.Litt., pp. 134a, 134b, and in Comyns' *Digest*, tit. "Certiorari" (A 1).

Arbitration cases have always been exempt from the operation of the writ because they had their own exclusive procedure: see Denning L.J.'s historical survey in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 351. If the arbitrator was guilty of misconduct a motion to set aside the award could be obtained: *Kent* v. *Elstob* (1802) 3 East 18; *Scougall* v. *Campbell* (1819) 2 Chit. 283.

[7] Cases of many types decided by justices used to be the subject of the writ, but the numbers of cases concerning justices were drastically reduced by the effects of the Justices' Protection Act, 1848, and the Summary Jurisdiction Acts, 1848 and 1857. The Justices' Protection Act placed limitations on these actions by instituting a rule which could issue calling upon justices to show cause why an act within their duties should not be performed, obedience to any such rule being an absolute protection from action in respect thereof. The Act has in effect been amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 8, so that in all cases where a justice refuses to perform some act relating to the duties of his office the party requiring the act to be done may apply to the High Court for an order of mandamus. If the court makes the order no action or proceeding whatsoever shall be commenced or prosecuted against the magistrate for having obeyed the order. The Summary Jurisdiction Act, 1848, standardised the form of convictions, so that all mention of the evidence or the reasoning by which the justices reached their decision was omitted. In the words of Lord Sumner in *R.* v. *Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128, at p. 159, "the face of the record 'spoke' no longer; it was the inscrutable face of a sphinx," and thus a certiorari on the ground of an error of law on the face of the record was virtually excluded: see *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw, supra.* The Summary Jurisdiction Act, 1857, instituted the modern form of the case stated.

> " . . . for it is a consequence of all jurisdictions, to have their proceedings returned here by certiorari, to be examined here. . . . Where any court is erected by statute, a certiorari lies to it; . . . which may command them to send their proceedings before them up hither, that it may be seen whether they confine themselves to their jurisdiction; which if they exceed, this court may correct them; and how comes it to be granted upon convictions by justices of peace, or order of Commissioners of Sewers?[9] I remember formerly the Commissioners of Sewers were advised by counsel not to obey certioraris, but they were all laid by the heels for following such advice, and obliged to obtain the King's pardon for the offence. And Mr. Callis, upon his reading upon the statute, holds, that their orders are removable hither by certiorari. Indeed we are so cautious often to deny it,[10] lest in the meantime the country should be overflown: but the general reason of the law is, that wherever a jurisdiction is set up by Act of Parliament to make convictions etc., certiorari will lie to remove them; as in the case of forcible entries. And the court is to examine, as far as appears on record, that they have not exceeded their authority; and if they have not, or not pursued the Act, to quash the proceedings."

Certiorari, therefore, is the stand-by of the common law, and it has been held that as a general rule it will lie to all inferior jurisdictions and act as the universal method of review.[11] The exceptions we have mentioned above[12] are thus grafted upon the general rule, and before they can be accepted they must be proved to have been adopted either by the common law or by statute. The *Nakkuda Ali* case and the *Parker* case suggest that the revocation of licences by an executive official is exempt from the possible control of a certiorari. The licences were of different kinds, one to deal in textiles and the other to run a taxi-cab in London, and so it is probably fair to deduce that the courts are in the mood to treat the revocation of all licences in the same manner. It is also fair to deduce that an official acts in much the same way in granting a licence as in revoking it, for he will weigh up the rights and wrongs of the application, in so far as he does so at all, in a similar way. He will weed out the frivolous application, just as he will dismiss the unwarranted complaint against a licence-holder. We may, therefore, treat his action in granting a licence as similar to that in revoking it, and we may also regard all licences as coming under the same general category, whatever they may be for in particular instances. A consideration of one particular type of licence should be a useful indication of the relevance or otherwise of certiorari in controlling the granting or revocation of licences generally; and an examination of the application of certiorari to Ministers will give some clues to the true nature of executive officials.

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[8] *Groenvelt* v. *Burwell*, 1 Ld.Raym. 454, 469, and 12 Mod. 386, 390. See also a more modern judicial statement to similar effect by Turner L.J. in *Biddulph* v. *Vestry of St. George, Hanover Square* (1863) 33 L.J.Ch. 411, 417.

[9] See Sir W. S. Holdsworth, *History of English Law*, Vol. 10, pp. 199–206, for an account of the Commissioners of Sewers and their powers.

[10] (We are too cautious to deny it often.)

CONTROL OF LICENSING JUSTICES

Licensing justices sit as bodies in plurality, unlike executive officials who, in our two recent cases, sat alone for the purposes of their decisions. But both Parliament and the courts have attempted independently at various times to exclude certiorari as a method of reviewing the decisions of justices sitting for licensing matters. In 1880 it was held that mandamus was not the proper remedy where one of the justices had an interest in an application, but that a certiorari was [13]; but in 1897 the House of Lords decided in *Boulter* v. *Kent JJ.*[14] that justices at a licensing meeting were not acting as a court of summary jurisdiction but in an administrative capacity, and for this reason in *R.* v. *Sharman* in the following year [15] it was decided that certiorari ought not to be granted. On the hearing of an application for a new licence for a hotel at a general annual licensing meeting, as provided for by the Alehouse Act, 1828, s. 1, witnesses had been called on behalf of persons who opposed the granting of the licence, and these witnesses had given evidence on oath. Another person had then appeared to oppose, and proposed to make statements of fact. The justices required that he should be sworn, but he refused, and they declined to hear him, granting the licence. He applied for a certiorari, or for a mandamus to compel the justices to give a proper hearing, but Wright J., in a judgment of eight lines, disallowed the certiorari; and he and Darling J. also refused a mandamus because the justices were acting within their jurisdiction in refusing to hear statements not made on oath.

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[11] *Cross* v. *Smith* (1702) 1 Salk. 148; *R.* v. *Dunn* (1840) 12 A. & E. 599; Viner's *Abridgment*, "Certiorari" (B); Bacon's *Abridgment*, "Certiorari" (B); Comyns' *Digest*, "Certiorari" (C), (D); F. J. Goodnow, "The Writ of Certiorari," 6 Pol.Sci.Q. 493 (1891).

[12] And in footnotes 6 and 7.

The *Sharman* rule, however, even though based upon an interpretation of a House of Lords decision, was not to remain long unquestioned. In the very next year a confirming authority under the Licensing Acts was held to be a court so that its decisions were subject to the writ.[16] And the rule itself must have ceased to be a rule when, only three years after *R.* v. *Sharman*, the writ lay in *R.* v. *Groom* [17] where a meeting of the licensing justices themselves had been held on an improper day. By section 2 of the Alehouse Act, 1828, the date of the general annual licensing meeting was to be fixed by justices at petty sessions. By section 3 (1) they were allowed to adjourn that meeting to such day or days as they may deem most convenient for persons applying for licences, and there was a proviso that every adjourned meeting should be held within the months of August or September in counties other than Middlesex and Surrey. Thus, where the justices of Harwich, Essex, had adjourned a meeting to a date after the end of September in order to allow the applicant, who had not given sufficient notice of his application, to give fresh notices, Lord Alverstone C.J. (with Lawrance J. concurring) found himself obliged to allow a certiorari to issue.

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[13] *R.* v. *Kent JJ.*, 44 J.P. 298.

[14] [1897] A.C. 556.

[15] [1898] 1 Q.B. 578; followed on the certiorari point in *R.* v. *Cotham* [1898] 1 Q.B. 802; and in *R.* v. *Bowman* [1898] 1 Q.B. 663.

[16] *R.* v. *Manchester JJ.* [1899] 1 Q.B. 571; followed in *R.* v. *Sunderland JJ.* [1901] 2 K.B. 357, when the writ lay on the ground of bias.

[17] [1901] 2 K.B. 157. The writ also lay to a local authority constituted under s. 26 of the Licensing Act, 1872, because an order by the authority was a judicial order: *R.* v. *Johnson* [1905] 2 K.B. 59.

The culmination of these cases seemed to come in 1906, when the Court of Appeal in *R.* v. *Woodhouse*[18] decided that a certiorari would lie where licensing justices improperly purported to refer an application for renewal of licences to quarter sessions under the Licensing Act, 1904, s. 1 (2). On this occasion the court was express in not following *R.* v. *Sharman* upon the point. The facts found were that, upon applications for the renewal of licences of certain licensed premises at the general annual licensing meeting, the justices, acting in accordance with an arrangement previously made with the owners of the premises, and without judicial consideration of the objections made to the renewal of the licences, granted provisional licences to the applicants and referred the applications to the quarter sessions under the provisions of the Act. In the course of exhaustive judgments Vaughan Williams, Stirling and Fletcher Moulton L.JJ. allowed both certiorari and mandamus to issue. The House of Lords reversed the decision in this case,[19] but only on the ground that the justices had honestly exercised their discretion, and that the transaction was bona fide for the purpose of carrying out the object of the Licensing Act, 1904, so that the renewals were valid and ought not to be quashed by means of a certiorari. The law decided in the Court of Appeal, therefore, remains good.

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[18] [1906] 2 K.B. 501.

[19] *Sub nom. Leeds Corporation* v. *Ryder* [1907] A.C. 420.

The effect of the case is that where licensing justices act in accordance with a previously made arrangement, and without judicial consideration of objections made, their grant of licences may be reviewed on being brought up by a certiorari.

Despite the clear indications in *R.* v. *Groom* and *R.* v. *Woodhouse* that the courts found it hard to exclude the remedy of certiorari where under the normal rules of the common law there would have been proper grounds for its issue, Parliament persisted in the attempt to provide for such exclusion. The Licensing (Consolidation) Act, 1910, s. 102, declared that no conviction or order of a court of summary jurisdiction under the Act should be removed by certiorari or otherwise, either at the instance of the Crown or of a private party, into any superior court. Nevertheless, in analogous cases, the writ was still held to be available for scrutinising the determinations of a confirming authority [20] and a local authority under section 57 of the Licensing (Consolidation) Act, 1910.[21] The better opinion seems to be that, despite the statutory exclusion, the law propounded in the *Groom* and *Woodhouse* cases is still good, and that the courts will in the future allow the order to issue where there has been a defect of jurisdiction in the justices, a breach of natural justice or fraud.[22] It is thus more than doubtful whether the apparent exemption of licensing justices from the field of certiorari is an exemption at all, for where one of the recognised grounds for the issue of the remedy exists the justices will not be free from its control merely because they are sitting for licensing purposes. Moreover, the Licensing (Consolidation) Act, 1910, is now repealed and replaced by the Licensing Act, 1953, and the recent case of *R.* v. *Brighton JJ., ex p. Jarvis* [23] extends the judicial trend outlined above. Justices consented to the grant of an occasional licence for certain premises, authorising the applicant to sell intoxicating liquors outside normally permitted hours, the licensee undertaking not to sell during that time liquor for consumption on the premises. The applicant already held a retailer's on-licence for other premises, but only an off-licence for the premises concerned. A rival trader applied for an order of certiorari on the ground that the grant was beyond the jurisdiction of the justices. The Divisional Court held that the justices' consent to the grant under section 148 of the new Act was a judicial, and not an administrative, act. Since an occasional licence, which could be granted only to the holder of a retailer's on-licence, was an on-licence itself, the justices had no power to consent to the grant of such an occasional licence to the holder of an off-licence for the premises concerned, restricting it so that it was in effect an off-licence. The order of certiorari, therefore, was granted. *R.* v. *Sharman* was not even mentioned, and may have been banished to the realms of legal history. As Lord Goddard C.J. says [24]:

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[20] *R.* v. *Richmond Confirming Authority* [1921] 1 K.B. 248.

[21] *R.* v. *Sussex JJ., ex p. Bubb* [1933] 2 K.B. 707.

[22] See, *e.g.*, Paterson's *Licensing Acts*, 52nd ed. (1944), p. 777. *Cf. R.* v. *Cheshire JJ., ex p. Heaver* (1913) 108 L.T. 374: an order of licensing justices was good on its face and no certiorari lay. There had merely been an erroneous decision on matters within the justices' jurisdiction, and no mandamus lay either.

[23] [1954] 1 W.L.R. 203.

> " It has been held since . . . *Boulter* v. *Kent JJ.* (*supra*), and that class of case, that the acts of justices in relation to licensing matters are judicial."

We have stated above that the orders or decisions of licensing justices are dissimilar to those of an executive official, whose prime duty, according to the *Nakkuda Ali* and *Parker* cases, is to administer a policy rather than to weigh up the rights or wrongs of a dispute, yet we submit that Mr. Gordon's arguments and the cases he quotes show that the method of decision of such an official is not far removed from that of any body of licensing justices. The very presence in the Defence (Control of Textiles) Regulations, 1945, under consideration in the *Nakkuda Ali* case, of the words " where the Controller has *reasonable grounds* to believe " renders the reasoning of the Judicial Committee exceptionally hard to understand. Where a certiorari is relevant the rules of *audi alteram partem* are beyond dispute, and *Cooper* v. *Wandsworth Board of Works* in 1863,[25] decided at a time when the bench was at one of its strongest periods,[26] is the jumping-off point for any consideration of the rule, yet it was not quoted in either *Nakkuda Ali* v. *Jayaratne* or the *Parker* case.[27] The power to demolish a house, where no notice by a private individual of the intention to build had been given, was vested in the Board by the Metropolis Local Management Act, 1855, s. 76, but the court nevertheless held that the power was subject to the overriding principle of *audi alteram partem*. The words of Erle C.J. are well worth quoting:

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[24] *Ibid.*, at p. 206.

> "The default in sending notice to the Board of the intention to build is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer. . . . I fully agree that the legislature intended to give the district board very large powers indeed: but the qualification I speak of is one which has been recognised to the full extent." [28]

Lord Loreburn L.C. lent the weight of a House of Lords judgment to this line of judicial thought when he was discoursing upon the duty of the Board of Education, as it then used to be, in *Board of Education* v. *Rice* [29]:

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[25] 14 C.B.(N.S.) 180. The case was an action for damages, but the principle of *audi alteram partem* is the most important point arising from it, and the rule is of general application in the field of the prerogative orders.

[26] Erle C.J., Willes, Byles and Keating JJ. heard the case.

[27] The most recent edition of Keir and Lawson, *Cases in Constitutional Law*, still quotes the case, together with *Nakkuda Ali* v. *Jayaratne*.

[28] 14 C.B.(N.S.) at p. 188.

[29] [1911] A.C. 179, 182; cited by Greer L.J. in *Errington* v. *Minister of Health* [1935] 1 K.B. 249, 266.

> "I need not add that in doing (deciding) either, they must act in good faith and fairly listen to both sides, *for that is a duty lying upon everyone who decides anything*. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any irrelevant statement prejudicial to their view. . . ."

The form of hearing cannot, of course, be prescribed as a general rule, for tribunals and bodies outside the courts of law are numerous and of diverse natures, dealing sometimes with what the French would recognise as disputes within the *droit administratif*, and sometimes with what they would prefer to call private law, such as disputes between landlords and tenants, or between employers and employees or trades unions.[30] But the principle of *audi alteram partem* is overriding, and, with the other rules of natural justice, provides the individual with the safeguards necessary in a society which has come to exalt the omnipotence of the State.

CONTROL OF MINISTERS

Inconsistencies of interpretation have arisen largely because of the difficulty of defining judicial, quasi-judicial, administrative, ministerial and executive powers and duties,[31] and fine distinctions have often been adopted, as in the *Nakkuda Ali* case itself, when Lord Radcliffe, reading the judgment of the Board, asserted that an official obliged to act reasonably in withdrawing licences was none the less not obliged to act judicially.[32] But surely it is best to revert to simplicity if possible, and simplicity is represented by what Lord Loreburn said in *Board of Education* v. *Rice* (*supra*). Viscount Haldane L.C. again went so far as to say of tribunals:

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[30] See, *e.g.*, R. S. W. Pollard, *Administrative Tribunals at Work* (1950); also J. A. G. Griffith and H. Street, *Principles of Administrative Law* (1952), Chap. IV.

[31] See, *e.g.*, the useful attempt by Mr. Gordon himself in his article "Administrative Tribunals and the Courts," 49 L.Q.R. 94, 419 (1933).

[32] [1951] A.C. at p. 77.

> "They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made."[33]

Of course the duty of a body may in certain circumstances be purely administrative or ministerial, with no opportunity of deciding between two arguments or two possible courses, but this must indeed be rare where the rights of the individual are infringed by, for example, the powers vested by statute in a Minister. One such purely executive or administrative duty, it seems, is a deportation order, so that the Minister is not bound to give the subject of the order an opportunity of being heard: neither certiorari nor habeas corpus will issue.[34] But perhaps the peculiar, even national, interests involved in this branch of the law take it into a completely separate category of its own. In the 1920's and 1930's cases were reported in which the remedy of certiorari was held inoperative because the body concerned had not the legal authority to determine the rights of subjects and did not perform judicial functions,[35] but the tendency of courts was towards issuing a certiorari wherever a judicial or quasi-judicial function could be read into the powers of the body. The decision of a rural district council allowing " development " under the Town Planning Act, 1925, s. 4, was sufficiently judicial to be the subject of a certiorari,[36] and the Milk Marketing Board was a suitable body to which the writ could be applied.[37] Again, the signing of a certificate of imbecility of a boy was a judicial act.[38]

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[33] *Local Government Board* v. *Arlidge* [1915] A.C. 120, 132.

[34] *R.* v. *Secretary of State for Home Affairs, ex p. Venicoff* [1920] 3 K.B. 72. It is arguable that the act was not purely executive in this case, but that the executive decision was prompted by some judicial element in the Home Secretary's duty; even so, this would lend weight to the suggestion that deportation orders are in a separate category of their own. See also a similar Australian decision in *R.* v. *Macfarlane, ex p. O'Flanagan and ex p. O'Kelly* (1923) 32 C.L.R. 518, where a board appointed to make recommendations as to deportation was held to be a non-judicial tribunal: neither prohibition nor certiorari nor *quo warranto* were suitable remedies. Isaacs J. (at p. 537) said that, from *R.* v. *Woodhouse* [1906] 2 K.B. 501, 534, *per* Fletcher Moulton L.J., it was clear that certiorari was not restricted to courts, but extended to judicial acts in a wider sense—but the body must have "some right or duty to decide." Rich J. (at p. 577) held that, since there was no decision, certiorari was inapplicable.

[35] *e.g.*, *R.* v. *Legislative Committee of the Church Assembly, ex p. Haynes-Smith* [1928] 1 K.B. 411.

Errington v. *Minister of Health* [39] has long been thought an important case. In considering a clearance order under the Housing Act, 1930, s. 1, and in deciding whether or not he should confirm the order, the Minister was not permitted by the Act to take into account any matters other than those mentioned in paragraph 4 of the First Schedule to the Act. The schedule runs thus: " If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification." That part of the paragraph did not apply because the objections were not withdrawn.[40] But the paragraph continues: " but in any other case he shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry, and may then confirm the order, either with or without modification." So, where he took into consideration *ex parte* statements, with which the owners had had no opportunity of dealing, even though objections to the clearance order had been lodged, he was held acting not in accordance with correct principles of justice, and his confirmation of the order was not within the powers conferred upon him by the Act. The application of certiorari to this type of case, therefore, seemed clear.[41] Scrutton L.J. once said:

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[36] *R.* v. *Hendon R. D. C., ex p. Chorley* [1933] 2 K.B. 696.

[37] *R.* v. *Milk Marketing Board* (1934) 50 T.L.R. 559; see also *R.* v. *Manchester Legal Aid Committee, ex p. R. A. Brand & Co., Ltd.* [1952] 2 Q.B. 413, in which a legal aid committee was similarly held to be a suitable body.

[38] *R.* v. *Boycott, ex p. Keasley* [1939] 2 K.B. 651.

[39] [1935] 1 K.B. 249; and see a note by H. G. Hanbury in 53 L.Q.R. 214 (1937), in which he points out that the case should be read in conjunction with, and in the light of, three other cases: *Marriott* v. *Minister of Health* [1937] 1 K.B. 128; *Horn* v. *Minister of Health* [1937] 1 K.B. 164; and *Offer* v. *Minister of Health* [1936] 1 K.B. 40.

[40] [1935] 1 K.B. 267, *per* Greer L.J.

> "There has been a great deal of discussion, and a large number of cases extending the meaning of 'court.' It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari."[42]

The nature of the tribunal described by the learned Lord Justice can hardly be distinguishable from that of the executive official in either the *Nakkuda Ali* case or the *Parker* case, and his words were quoted with approval by Singleton L.J. in the *Northumberland* case, possibly the most important certiorari case of the present century.[43]

Unfortunately the tide of cases leading up to *Nakkuda Ali* v. *Jayaratne* and *R.* v. *Metropolitan Police Commissioner, ex p. Parker*, and hindering the operation of the *Errington* rule, has been of considerable substance in recent years. Apart from analogous cases,[44] four cases within the space of one year, 1946–1947, determined that a compulsory purchase order made by a local authority and confirmed by the Minister was an administrative, not a judicial, act, and that an application for a certiorari was useless.[45] Although the Minister was obliged to make available to both sides matter which had come into existence for the purpose of the *quasi-lis*, the inception of which was marked by the making of the objections, yet there was no obligation on the Minister to make available material which came into his possession before that date. Perhaps even this concession is a pointer to a more reasonable judicial solution of these cases. Despite the discouraging effect of the *Stevenage* case,[46] one decision of 1946, *Stafford* v. *Minister of Health*,[47] which has, rather strangely, been overlooked in more recent cases, might also aid the courts in achieving this solution. A landowner was informed by a local authority of the intention to apply to the Minister of Health for confirmation of an order for compulsory purchase, for housing purposes, of land belonging to him. He submitted notice and grounds of objection to the Minister, which the Minister, without informing him, sent to the local authority, who sent the Minister a detailed reply. The Minister, without informing him of this detailed statement of the local

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[41] A significant exclusion of the *Errington* rule has, however, been made in the Town and Country Planning Act, 1947, s. 10 (3). It is provided that if, after objections have been lodged to a plan, the Minister is of opinion that the local planning authority, or any other authority or person, ought to be consulted before he comes to his decision, "he shall consult that authority or person, but shall not be under any obligation to consult any other authority or person, or to afford any opportunity for further objections or representations, or to cause any further local inquiry or other hearing to be held." See also Griffith and Street, *supra*, p. 174.

[42] *R.* v. *L. C. C.* [1931] 2 K.B. 215, 233.

[43] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 341. This case finally settled that error of law on the face of the record of an inferior court or tribunal was a ground for the issue of certiorari. See a note by Mr. S. A. de Smith in 14 Mod.L.R. 207 (1951).

[44] *e.g.*, *Liversidge* v. *Anderson* [1942] A.C. 206; a case of false imprisonment which is well discussed in the judgment in *Nakkuda Ali* v. *Jayaratne*; and *Howell* v. *Addison* [1943] 1 All E.R. 29: under the governing regulations, the Defence (General) Regulations, regs. 51 and 62, and the Cultivation of Lands Order, 1939, the Minister of Agriculture and Fisheries had consented to the termination of a tenant's tenancy, after the War Agricultural Executive Committee had found the facts of bad husbandry. It was held that once the committee had found the

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necessary facts the act of the Minister in giving his consent to the termination of the tenancy was a purely executive one, and he was not bound to hold an inquiry before giving such consent. No case had been made to justify the granting of the interlocutory injunction claimed. An editorial note in the *All England Report* of the case suggests that it is clear the relief was refused on the ground that the evidence was insufficient, so that what was said on the construction of the regulations was *obiter*. Nevertheless, a strong Court of Appeal (Lord Greene M.R. and Goddard L.J.) inclined to the view that the committee, in deciding a holding was not being cultivated according to the rules of good husbandry, was performing a delegated executive act of the Minister, not exercising a quasi-judicial function.

[45] *Miller* v. *Minister of Health* [1946] K.B. 626; *Price* v. *Minister of Health* [1947] 1 All E.R. 47; *Summers* v. *Minister of Health* [1947] 1 All E.R. 184; *Johnson* v. *Minister of Health* [1947] 2 All E.R. 395.

[46] *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87: the House of Lords held that the Minister, in considering the report of a person holding a public local inquiry under the New Towns Act, 1946, Sched. 1, para. 3, had not a judicial or quasi-judicial duty imposed on him, so that considerations of bias were irrelevant; the sole question was whether or not he genuinely considered the report and the objections. The Minister need not call evidence in support of his order, because the object of the inquiry was only to inform his mind, and not to consider any issue between him and the objectors.

[47] [1946] K.B. 621.

authority's case, and having, in exercise of his discretion under the Housing (Temporary Provisions) Act, 1944, decided not to hold a public local inquiry, thereupon confirmed the compulsory purchase order. Charles J. held that the confirmation order was invalid and must be quashed, since a mere notice and grounds of objection did not constitute a presentation of the landowner's case, and, as the local authority had had an opportunity of presenting their case in detail, the Minister had acted without hearing both sides.

CONCLUSIONS

The powers and duties of a Minister are distinct from those of the officials in the *Nakkuda Ali* and *Parker* cases, yet the latter are only one or two rungs further down the ladder from a Minister. Maybe they are in a position half-way between the status of a Minister and that of licensing justices, but whether or not that is a true assessment it must be admitted that they cannot be of a separate genus. Atkin L.J. laid down four tests for the application of certiorari,[48] namely that the inferior jurisdiction must (i) have legal authority, (ii) to determine questions affecting the rights of subjects, (iii) have the duty to act judicially, and (iv) have exceeded its jurisdiction. This omits any mention of breach of the rules of natural justice or error of law on the face of the record as grounds for the issue of the remedy, but otherwise can be accepted. An executive official revoking a licence must, of necessity, weigh up the rights and wrongs of the matter before arriving at his decision—in the words of Scrutton L.J.,[49] " decide on evidence between a proposal and an opposition." Thus, by the normal definitions of the term there must be some judicial flavour in his determination. It surely cannot be the policy of the bench to narrow the meaning of " judicial " to such an extent as to place the decision of any " official " upon any matter in the category of protected executive duty, and yet this appears to be the trend from our two recent "executive official" cases. "Official" is a wide term and does not cover only governmental officials. The task of the judiciary has never been that of shielding the government and allowing it limitless powers; still less should it go to excessive trouble to protect all officials. What in any case is the harm of a hearing? Why should the Metropolitan Police Commissioner have refused to hear the cab-driver at all? If there were good grounds for the revocation of the licence they would have become apparent at the hearing, and if there were not the licence ought not to have been revoked. It is submitted that the inability of the courts to exclude certiorari in licensing cases where a proper ground for the remedy exists is a healthy and encouraging sign, despite the attempted exclusion of certiorari, and that *Stafford* v. *Minister of Health* points to a more just result in the Ministers' cases than most of the others quoted above.

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[48] *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 204-205; approved in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw*, *supra.*
[49] *R.* v. *L. C. C.* [1931] 2 K.B. 215, 233, *supra.*

The battle is not yet over,[50] for *Nakkuda Ali* v. *Jayaratne*, although a case before the Privy Council, and thus of great weight, is not binding, and the *Parker* case was only decided at the level of the Divisional Court. It is open to the House of Lords at some future date to resolve the whole problem, and it is to be hoped that due note would be taken of comparative law. In 1950 a case before the Conseil d'Etat in France had very similar facts to those in the *Nakkuda Ali* case, and it was decided in exactly the opposite way.[51] In the New Zealand case of *New Zealand Dairy Board* v. *Okitu Dairy Co., Ltd.*,[52] the dairy company was faced with the loss of its butter-making business as the result of an order of the Dairy Board, allotting a certain area to another company exclusively. Although there had been some negotiations it was found as a fact that the company had not been given fair warning of the impending order, and the New Zealand Court of Appeal held (although only by a majority of three to two) that the company had a right to a fair hearing. Thus the Board's order was set aside. At a time when the prerogative orders may sometimes be thought insufficient for the needs of the present day,[53] might not a decision by the House of Lords disapproving of *Nakkuda Ali* v. *Jayaratne* and *R.* v. *Metropolitan Police Commissioner* remove much of the growing uneasiness?[54]

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[50] The gloomy view taken by Mr. H. W. R. Wade in "The Twilight of Natural Justice?", 67 L.Q.R. 103, and in "Administrative Law and the Right of Self-Defence" in *The Law in Action*, a series of broadcast talks (1954), pp. 81–90, is probably not yet fully justified.

[51] S, 1950, III, 41.

[52] [1953] N.Z.L.R. 366. Mr. de Smith, in his *Harvard Law Review* article (*supra*) expresses the hope, at pp. 596–599, that English courts will be influenced by the recent vitality of the *audi alteram partem* rule in Commonwealth countries.

D. C. M. YARDLEY.

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[53] See, *e.g.*, G. J. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law," 18 Mod.L.R. 138 (1955).

[54] I am much indebted to my wife, who has read through this article and suggested a number of important changes.

LAW IN A COLD CLIMATE

THE SCANDINAVIAN REALISM

> "The Swedish school has advanced an analysis of the nature of law which is of universal validity. The modern approach to jurisprudence may be said to be an assertion of the purely factual nature of law. . . . We can say that the modern realist approach is the only one possible for us; it is the way in which we think."[1]

A. Being against legal positivism used to be a fairly cut and dried matter of contradicting Austin. One could recognise positivists and anti-positivists fairly easily. Nowadays I am not sure that I know one from the other. There seems to be some dispute about the title.

B. I admit that the term is hardly a precise one. But what are your difficulties?

A. Well, to begin with, "positivist jurisprudence" and "analytical jurisprudence" seem to excite the same "metajuristic" feelings. But doesn't "analytical" describe a method rather than a doctrine?

B. Primarily, yes.

A. This is interesting because one could hardly speak of one method *contradicting* another. Might not one be an analytical jurist *and* a sociological jurist *and* believe in natural law without ever contradicting oneself?

B. It might be hard to find examples. But I admit that the textbook layout (the x school, the y school, the z school) helps to give a too simple "pigeon-hole" view of jurisprudence.

A. There is another thing which might also falsely suggest conflict—that is, the habit of expressing different interests in an abbreviated way. Someone may say "law" is x or y or z, when he means "the purpose of the law," or "the material of the law," or "the machinery of the law," or even " the study of the law." (Compare " Politics is . . . ") A sociological jurist who says " law " is a system of social engineering isn't, I should have thought, either agreeing or disagreeing with one who says " law " is a command, or a normative rule, or what the bench will say tomorrow.

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[1] G. B. J. Hughes, *Jurisprudence* (1955), p. 170.

B. I am not so sure. There is a kind of disagreement, historically at least, between the inferences which have been drawn from these different statements—and I admit that they are different types of statement. Those who have followed Austin in an analytical approach have not been interested as jurists in the content of the law or its effects as a guarantee of social solidarity or anything else. It is not so much a question of its not being impossible for one man to have different concerns at different times, but of an insistence on a particular conception of what a jurist is.

A. You mean that it is only a psychological curiosity if an analytical jurist believes in natural law and advocates welfare legislation in private life.

B. Yes, if you like.

A. You, I take it, would call yourself a positivist?

B. *Qua* jurist, yes.

A. And what exactly would you mean?

B. I should mean by a legal positivist one who regarded jurisprudence as a study of the observable facts of existent legal systems and who rejected explanations of the nature of law based upon metaphysical notions.

A. You would then call yourself also a realist. Isn't this why the Scandinavian positivists are sometimes referred to as realists?

B. Yes, broadly speaking, I would say that Hägerström, Olivecrona, Ross and Lundstedt in stressing the purely factual nature of law have been both positivist and realist. I would not myself regard either of these labels as pejorative.

A. Why " realist " though? It isn't the same realism as the American realism, is it? And it isn't realism in the philosophical sense (perhaps nominalism rather). Is it that empiricism is more tough-minded than its opposite and traditionalism less realistic than radicalism?—or that what legal sociologists write about is more real, more down to earth than anything else?

B. These things may have a little to do with it, but not very much. I would prefer to use the word as shorthand for adherence to two rather general kinds of principle. One principle is shared by the American realist writers, namely that formal legal rules have assumed an undue importance in legal analysis and need to be deflated and seen as merely one form of influence on social and judicial behaviour. The second principle is of a different kind, and really derives from an epistemological one. Law is a system by which social ends are achieved. These ends cannot be the subject of scientific delineation. As Olivecrona says: "We like an end or we don't. We strive for it. We are uninterested. We strive against it. That is all."[2] On a realist view legal relations are merely events in the causal world, and this view stands in opposition to all systems which invest the notion of law with an independent binding force. The force of law is a metaphor. It should not be elevated into a mystery.

A. As a sympathiser with this position you would define law then in terms of social regularities?

B. No, one could hardly *define* law in terms of uniformities in social life, or in the behaviour of officials or in anything else. The way officials behave is not the same thing as the rules by which they regulate their behaviour. Nor would one want to say that law is what the courts will decide. A judge could hardly decide a case on the basis of a prediction about how he was going to decide it.[3] To think of law as emanating from or as the command of the State or of Parliament is just as unsatisfactory. Nobody in fact wills or commands the laws—even statute laws.

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[2] In *Interpretations of Modern Legal Philosophy* (1947), p. 543.

[3] Olivecrona, *ibid.*, p. 544.

A. Well yes, I suppose M.P.s are much too busy these days to go around willing and commanding the laws [4] or even to remember what it is they should be willing or commanding. But was this ever denied by anybody who thought laws were commands? Would Austin have denied it?

B. I would not wish to suggest that laws do not have an imperative force. They certainly have such a force. Olivecrona calls them "independent imperatives." This is not because they are in the imperative mood, but because of their effect in action. Laws certainly have the *psychological force* of a command.

A. So, I suppose, has a fire alarm, but I am not sure how useful it might be to call it an independent imperative.

B. All I am insisting on is that a law is a form of words which is not necessarily declaratory of anyone's will and which need not (unlike a normal command) be addressed to anybody in particular. This form, in itself, does not constitute the imperative as a rule of law. A draft bill might contain similar independent imperatives but it would not embody a legal rule, since it would lack the mark or emblem placed upon it by enactment according to the rules of the constitution.

A. But isn't it odd to explain the nature of a legal rule by saying that it is enacted according to a rule? Oughtn't you to say, not that laws are independent imperatives to which an enacting formula has been added, but that it is the badge or emblem of enactment which is the psychological cause of their being regarded *as* imperatives?

B. That would perhaps be the more accurate way of expressing it. But it is not strictly true to say that a rule of law is a rule because it is enacted according to a constitutional rule. There are two senses of "rule" here. Certainly rules of law can result only from an authorised form of action (or rule). But it is not this procedure which itself confers upon the enactment the status of a legal rule. It is the fact that the procedure has the psychological force and effect that it has which brings this about.

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[4] In *Law as Fact* (1939), pp. 37–38, Olivecrona gives a number of reasons why it cannot be said that legislators command the laws, *e.g.*, they merely walk out of different doors, put their hands up, etc., "which is something very different from issuing commands."

A. I suppose this is what Lundstedt means when he says: " The paragraphs which are called rules have their significance through the psychological power which they have over people."[5] But it seems confusing to assert that " In point of fact there *are* no legal rules and that the idea of a rule becomes natural if one believes in the binding force of law."[6] This seems to be stuffing the words " rule " and " binding " with metaphysical straw for the purpose of pulling it out again.

B. Lundstedt's main concern is to show that rules of law do not derive what people feel to be their force from any entity or power such as Justice, which precedes the putting into operation of legal rules (or procedures). The same is true of such concepts as " rights " and " ownership." The rules do not refer to or follow from these mythical conceptions. These conceptions are merely the product of the rules.

A. The so-called rules?

B. Of the procedures whose function is to maintain society in existence. There is no greater social interest than that of society in perpetuating itself, and unless one can be produced, no other basis for law can be demonstrated.[7]

A. I am not sure that I know what is involved in looking around amongst social interests for a basis of law. What are the possible candidates and what is it that they are competing for? Isn't it getting very near to tautology to say that society's greatest " interest " is the maintenance of its existence? And even if this is true, why must it follow that the basis for law is an " interest " at all? Shouldn't we unpack the " basis of law " idea rather more carefully? It might mean a number of things, *e.g.*, the justification of a legal rule or a system of legal rules, the source of all legal rules in a system, or the purpose served by a system of laws, or the essential element in a definition of law or of legal system, or the common element in a number of legal rules. And it sometimes seems to be used without overmuch deliberation in several of these senses. There seems to be just as much slipperiness about the concept of " finality " or " end " of law. Olivecrona, attacking Kelsen, describes him as picturing in his hierarchy of norms a kind of legal fountain, which somewhere is supposed to stop.[8] There is a sense of finality here, I suppose, which has to do with generality. The final rule is the most *general* rule or principle in a system. Olivecrona then goes on to make the points (a) that finality is illusory since no such thing can be discovered in the causal process of which legal phenomena are a part, and (b) that the end or ultimate basis of law cannot be discovered since ends cannot be the subject of scientific research. These senses, causal and moral, have no connection with the first sense of finality but they get bundled together into a composite argument about the " end " of law. Why is it that Kelsen gets such rough treatment from realists and positivists?[9] I have always thought of him as a positivist himself.

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[5] " Law and Justice " in *Interpretations of Modern Legal Philosophy*, pp. 465 *et seq*.

[6] *Ibid*.

[7] *Cf*. Lundstedt, *op. cit*., pp. 474 *et seq*.

B. One would certainly call Kelsen an analytic jurist, but if the criticism of a positive theory of law is that it deals with existing observable legal phenomena, then his analysis has serious defects. It is a dualistic theory,[10] which suggests that the operation of legal rules cannot be understood as sequences of events in the world of cause and effect but must be referred to a "normative" realm. It is impossible, Olivecrona says, to explain how facts in the actual world (the actions of legislators) can produce effects in the wholly different world of the ought.[11] Kelsen insists that the relationship between legal causes and their effects is an ought relationship. He has banished law from the factual causal world into a nebulous world having no connection with reality.[12]

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[8] *Interpretations*, p. 543.

[9] *Cf.* Hughes (*Jurisprudence*, p. 81), " Kelsen can never deserve the title of positivist."

[10] The Swedish criticism, Hughes writes, " exposes Kelsen's system as yet another attempt to lift law above the stream of social facts." *Op. cit.*, p. 81. *Cf.* Alf Ross's *Towards a Realistic Jurisprudence* (1946).

A. But Kelsen is surely saying that the statement of a legal rule prescribing a course of behaviour is not about what goes on in the world in the sense that a causal statement is about what goes on in the world. Does this imply that it must be about what goes on in some other world? If it does, then all moral statements as well as legal ones must be regarded as implying a duplicate realm of moral/legal reality, and as being open to the retort that there is only one world.[13] (But perhaps this is exactly what you would want to say.) Kelsen may, I suppose, have brought some of this on his own head by describing the relation "If A then B ought to be 'as a connection' different from but as unshakable as causality."[14] (If A then B must be.) But it is surely wrong to treat the relationship between, for example, hanging and the rule that murder is punishable by death as either unshakeable or the opposite. What the realist theory seems to offer here is a dilemma. Either a statement about the liability of a murderer to be hanged under a rule prescribing capital punishment is about the causal world, in which case its " unshakeability " may be attacked by showing that condemned murderers sometimes escape, or it is a piece of nonsense which does not describe reality at all. This seems to be a special case of a wider proposition—that all statements about the world [15] can be divided into statements about facts and statements about myths.

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[11] *Law as Fact*, pp. 20–21. "Kelsen has not the slightest interest for this relation of cause and effects . . . nay more, he expressly denies that the law belongs to this context. . . . It does not concern the law itself because law has only to do with the relation of ought." But "This mystical relation is merely an empty phrase . . . How on earth can our law makers at their very prosaic meetings manage to establish such relations?"

[12] "The word 'ought' and the like are imperative expressions which are used in order to impress a certain behaviour on people. It is sheer nonsense to say that they signify a reality. . . . The laws are links in the chain of cause and effect." *Law as Fact*, p. 22.

[13] Various spatial locations of "justice" and "law" are attributed to anti-positivist writers. Justice is "not in time and space." It is analogous to "the myth of the elephant carrying the world on its shoulders" (Olivecrona, *Interpretations*, p. 548). It is "an idea elevated above man," "an ideological superstructure on objective reality." It is sometimes said to be over, sometimes under, sometimes "outside" or on a different plane: clearly none of these positions is respectable.

[14] "The Pure Theory of Law" (1934) 50 L.Q.R. at p. 485.

B. But you must admit that there are feelings about the law which could qualify as myths. Isn't it a myth to imagine that votes and signatures on pieces of paper can be transmuted at a point in time into law by which people feel bound? An act of legislation cannot transform these actions into something very different. There is in fact no need for mystification here. The social process is perfectly clear. But though the mystical background of law-making and authority has vanished we still feel inclined to think of the laws as taking on an existence as permanent entities. The same is true of concepts within the law. A contract or marriage is psychologically connected with the idea of an entity. The word " marriage " doesn't connote any actual fact or situation in the world [16] over and above certain ceremonial [17] activities which are regarded as giving rise to it. This is the typical function of legal language. It constantly refers to imaginary powers—rights and duties which are regarded as being created and extinguished, when such and such facts have occurred.[18]

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[15] The expressions " factual " world, " everyday " world, world of nature and causal world seem to be used interchangeably. But what business has the concept " cause " here. *Cf.* D. D. Raphael, " Law and Morals," *Philosophical Quarterly*, Oct., 1954, p. 348. " Why should natural power and the liability to be subjected to the exercise of such power be included in the world of " facts " when claims and obligations are excluded? If the positivist world of facts is to include dispositions as well as observable events, what is the criterion of fact?

[16] This is an argument of Olivecrona's. There is, he says, no common factual element in the concept of a marriage. People's actual married situations are very different. Even the idea of cohabitation cannot supply a common element, since some men don't live with their wives.

[17] The more ceremonial, the clearer is the association in Olivecrona's view between the psychological effect of a procedure sanctified by the law and primitive magical beliefs. The crowning of the Queen, he holds, is crude magic. The mutual offsetting of a debt between two banks is subtle magic, and in between there is a range of situations, some crude, some less so.

A. But here, I am sure, you are offering a peculiar and unnecessary alternative. Is it necessary to treat all statements which are not simply descriptive of events as descriptive of imaginary events or of psychologically induced fictions? Something of this kind seems to be behind the assertion that a positivist theory must deal only with the observable facts of positive law.[19] And " deal with " here seems to mean " contain only statements which describe events and indicate causes and effects." It would surely be impossible to discuss any social activity with such a linguistic restriction. A realist translation *might* be provided of many kinds of statement besides legal ones which refer to a status or are in some way performatory. The election of a chairman, the naming of a ship, or the scoring of a goal [20] might provide examples. " Mr. John Jones is appointed chairman " does not describe an event. Goals are not facts in the world. Balls flying over or under pieces of wood are not goals. But they aren't—would a realist say this?—anything " over and above " except metaphysical entities. The larger the claims which are made for this form of realism the more one's uneasy feeling grows that it misrepresents the function, not merely of legal but of any language. No one minds applauding the ambition to relate law to its social context, or to encourage the sociological study of legal phenomena, or to promote particular theories about the relation between law and morals. But do they force us to subscribe to a sort of jig-saw puzzle jurisprudence in which all talk about the law must somehow be fitted into a one-dimensional plane inhabited by " facts," " causes " and " events " ?

GEOFFREY MARSHALL.

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[18] Olivecrona, *Law as Fact*, p. 100.

[19] Hughes, p. 58.

[20] *Cf.* H. L. A. Hart on the concept of " a trick " in a game of cards (" Definition and Theory in Jurisprudence" (1954) 70 L.Q.R. 37 at 58).

CASES AND COMMENT

1. SCOTTISH CASES

**WILL—
Revocation on
copy.**

The dangers which attend the Scottish doctrines relative to holograph wills and codicils are principally that more and more informal documents will be held to have testamentary effect and that the benign attitude of the courts to these documents will lead to practically any expressions of wish being effective. *Thomson's Trs.* v. *Bowhill Baptist Church and Others,* 1956 S.L.T. 302 goes fairly far in these dangerous directions, and while it seems highly probable that in this case effect was given to what the testatrix intended at the time of her death it cannot be regarded as other than a case of stretching the law as far as it will go. The testatrix left a formal trust disposition and settlement, properly executed before witnesses, under which certain charities were beneficiaries under the residue clause. After her death there was found a copy of her will in which the residue clause had been cut out with scissors and it was evident from ink marks that the lines of typing had been deleted in ink before the part of the sheet had been excised. The excision was, however, authenticated by two holograph signatures and immediately after the end of the typing there was a holograph and signed note by the testatrix explaining that she had cut out the residue since there was not enough money to meet these bequests. In point of fact this belief was erroneous. The First Division held that the mere excision was ineffective, since the passage still appeared in the principal copy of the will but that the excision coupled with the authentication thereof and the signed and holographed note immediately following explaining what she had done had *in cumulo* the effect of a holograph codicil amending the will in that particular. The Lord President remarked that the case was a narrow one, which it undoubtedly is, and laid stress on the collocation of factors mentioned, and he was able to reach the view he did only by invoking the doctrine of giving a benign construction to holograph testamentary documents and construing the whole operation of excision, authentication and addition of holograph signed note as validly evidencing an intention to revoke the will in part. In the result, accordingly, the residue clause was revoked and the money fell into intestacy. The last specialty in the case lay in that the testatrix's belief that she had insufficient funds to satisfy the prior bequests and leave any residue was unfounded but this the court rightly treated as irrelevant. The point is surely covered by the tract of authority that a bequest or cancellation is valid even though the testator made it in ignorance of the exact state of his assets. Furthermore, if that point had been treated as material, questions might frequently arise as to a testator's knowledge or the valuation of his assets. It is hard to see how the legal validity, as distinct from the effect, of a bequest could be made to depend on the existence of assets or knowledge of their existence.

D. M. W.

NATIONAL SERVICE—
Exemption for " regular minister."

It is an odd commentary on the making of Scots law that the decision of the House of Lords in *Walsh* v. *Lord Advocate*, 1956 S.L.T. 283 was arrived at by a Bench consisting of a Chancery man (Lord Morton of Henryton), a common lawyer (Lord Somervell), a Scots lawyer (Lord Keith), the Lord Chief Justice of England (Lord Goddard) and the Lord Chief Justice of Northern Ireland (Lord MacDermott). The case in fact turned on the interpretation of a United Kingdom statute (National Service Act, 1948) and no specialty of Scots law was in issue, which is just as well because it would be very regrettable if an appeal in a Scottish case were to be heard by a tribunal thus composed: it would be a state of affairs which could be contemplated with equanimity only on the most theoretical and abstract basis of constitutional law since nobody could pretend that that tribunal would be in fact a suitable tribunal for the final disposal of appeals from Scotland. If the Chief Justices of England and Northern Ireland have peerages which entitle them to sit to hear appeals from, *inter alia*, Scotland, surely the Lord President equally should be ennobled and entitled to participate in deciding appeals from other parts of the United Kingdom. The notion sometimes urged that the House is the *forum commune* sometimes seems to be one-sided. At least at the Union it was never provided, as was done with in 1800, that appeals should go to the King's Bench!

The point in *Walsh* was tolerably simple: a member of the religious denomination known as *Jehovah's Witnesses* claimed exemption from military service as being a "regular minister of any religious denomination." A lengthy proof was heard in the Outer House from which it appeared that Jehovah's Witnesses were in fact a religious denomination and this view was not challenged in the Inner House or before the House of Lords. The noble and learned Lords had no great difficulty in affirming the judgment of the Second Division and holding that the appellant was not a regular minister, since the sect did not create ministers at all, all members of the body (as distinct from mere adherents) being recognised as ministers of the Gospel on a par one with another. The decision is entirely in line with the decision of the U.S. Supreme Court cited and also with one (not referred to in argument) of the Supreme Court of New Zealand (*James* v. *Smith* [1954] N.Z.L.R. 707). All of their Lordships declined to attempt to formulate a definition of "regular minister" though many indicia of "regular minister" appear from the speeches. Thus Lord Goddard stressed that distinct spiritual or pastoral status was a necessary attribute, not merely performance of particular functions; so too it was emphasised that "regular minister" always referred to particular members of a sect, having peculiar and superior standing, set apart in some way from the general body of members. Clearly the clerk in orders, the priest, the minister, the rabbi, the pandit, the imam are all distinct from their followers in status as well as duties and that was precisely where the appellant failed. The result, of course, does nothing to cast doubt on the beliefs or organisation of the denomination in question but simply finds that the appellant was not a "regular minister" of the denomination; and indeed from the evidence and judicial observations it appears that there are no regular ministers among Jehovah's Witnesses, even though all may in some sense be ministers.

D. M. W.

JUSTICIARY—Application to lead additional evidence.

Higgins and Another v. *H. M. Advocate*, 1956 S.L.T. 307, was one of the fairly rare cases when the Secretary of State for Scotland referred a matter to the High Court under the Criminal Appeal (Scotland) Act, 1926. Higgins and Imrie were convicted on a charge of breaking into a shop and stealing therefrom. They did not appeal but presented petitions to the Secretary of State alleging that the evidence given against them by two policemen was false. The two policemen were later charged with perjury and acquitted but before that the Secretary of State had referred the petitions to the High Court under section 16 (*a*) of the 1926 Act. The two accused then presented notes of appeal requesting leave to call further evidence, the existence of which had been unknown to them at the time of the trial. The court held the petitions to be notes of appeal against conviction and sentence so that the only point in issue was whether the fresh evidence should be permitted. The test whether the adduction of fresh evidence was permissible was the same, the Lord Justice-General said, whether the matter were considered in a direct appeal or, as was the case here, following a reference under section 16 (*a*). That test, moreover, was: " Are we (*i.e.*, the judges of the High Court) reasonably satisfied that the new evidence, if placed before the jury, would have produced a contrary result?" Applying that test the Lord Justice-General could not affirm that if the further evidence had been before the jury it would have led to an acquittal. The additional evidence, even if all proved, would still be quite consistent with the evidence put before the jury and accepted by them. Lord Russell concurred, both as to the test to be applied and as to the result of its application. Lord Carmont, however, dissented on the view that the court need not be *certain* that the jury would have given a different verdict if the additional evidence had been before it, and there is strong support for this view in authorities cited by his Lordship, namely, *Slater*, 1928 J.C. 94; 1928 S.L.T. 602; *Lowson*, 1943 J.C. 141; 1944 S.L.T. 74; and *Gallacher*, 1951 J.C. 38; 1951 S.L.T. 158, and in the general observation that it is very difficult indeed for an appellate court ever to be *certain* about the verdict a jury might have given in different circumstances. Neither law nor jury behaviour is predictable to that extent. Lord Carmont put it very well by remarking that Lord Moncrieff's test in *Lowson* (rejected in *Gallacher*) that the test was whether the new evidence "might affect the jury" was too wide, but that the test proposed, whether the new evidence would have changed the verdict, was too stringent. On the whole his Lordship's dissenting judgment carries conviction and seems preferable to those of the majority and the consideration whether the new evidence would, with reasonable probability, have made the jury take a different view appears one more readily applicable and more consistent with other parts of the law, such as the testing of the verdict of a civil jury, or of a criminal jury in a straight appeal uncomplicated by questions of fresh evidence. In such cases the appeal court need not be quite certain that the jury was wrong; they may interfere and overturn the verdict if it appears unreasonable, that is, if it is at least reasonably probable that it was wrong.

D. M. W.

2. ENGLISH CASES

CHARITY—Failure—Whether funds held on resulting trust or to be applied cy-près.

The facts in *Ulverston and District New Hospital Building Trusts* [1956] 3 W.L.R. 559 were that over a period of years appeals were made for contributions to a fund known as the Ulverston and District New Hospital Building Fund. The purposes of the trust fund were never put into effect and the trustees latterly sought the direction of the court as to what should be done with the money in their hands. Some of this money had been contributed by named donors and the rest collected from unidentifiable sources, such as anonymous donors, street collections, entertainments, etc. Although it was clear that the money contributed by named subscribers was so subscribed for a particular rather than a general charitable purpose it was contended that as their contributions had been mixed with those from unidentifiable donors who could not have expected their money back, the whole trust was therefore stamped with a general charitable character and should be the subject of a comprehensive cy-près scheme. The Court of Appeal, however, held that this was not so and that the money in the hands of the trustees received from identifiable sources was held on resulting trusts. It was observed by Jenkins L.J. that donations from unidentifiable donors given out-and-out without any indication of what it was intended should be done with the money if the purpose should prove to be impracticable, might be *bona vacantia*. However, it appears that this is of little practical importance in England because in such cases it is the practice for the Attorney-General to waive the claim of *bona vacantia* and bring in a scheme for the *cy-près* application of the part of the fund derived from anonymous sources.

W. A. E.

CONFLICT OF LAWS—Matrimonial domicile —Law governing widow's rights to husband's property.

In no sphere of law are the writings of living authors more frequently quoted in the law courts than in private international law for in no sphere is the case law more contradictory. But even the textbook writers are sometimes in disagreement. In *Re Egerton's Will Trusts* [1956] 3 W.L.R. 453 Roxburgh J. was required to consider the rival contentions of Professors Cheshire, Dicey and Dr. Morris. The facts were that in 1932 a domiciled Englishman married a domiciled Frenchwoman and afterwards lived with her in France where he had acquired a French domicile by the time of his death in 1951. His widow claimed that the testator's estate should be administered in community of property according to the law of France. She contended that the evidence showed an intention on the part of the testator and herself to live permanently in France immediately after the marriage, that they had carried out this intention and thus justified the inference that they intended the law of France to apply to all their personal property as from the time of their marriage. It was held, however, that there was a presumption that the law of the husband's domicile at the time of the marriage applied to the rights of the husband and wife to each other's moveables, which presumption could only be rebutted by an express contract to the contrary or a tacit contract if the circumstances warranted it. But in the particular circumstances, no such inference could be drawn from the conduct of parties as to justify an inference that they had entered into a tacit contract that the law of France was to apply to their mutual property rights. In so concluding Roxburgh J. appears to have run counter to the views expressed by Professor Cheshire (see his *Private International Law*, 4th ed., pp. 491–493).

W. A. E.

The recent case of *The Guildford* [1956] 3 W.L.R. 474 follows *The Paludina* [1927] A.C. 16 and will doubtless be cited in the future as an authority on remoteness of damage.

REMOTENESS OF DAMAGE—Novus actus interveniens.

The plaintiffs' vessel, the *Temple Bar*, ran into the defendants' vessel, the *Guildford*, in a fog, holing her severely. The master of the *Temple Bar* then offered to tow the *Guildford* but his offer was refused, the master of the latter vessel preferring to await the arrival of the assistance for which he had already sent. The hole in her side had been blocked by some of her cargo of coal. Five hours later the *Guildford* was taken in tow by a tug with a view to beaching her but her coal started to dislodge and she sank as a total loss. Liability for the initial collision was apportioned in the proportions of one-quarter to the plaintiffs' vessel and three-quarters to the defendants'. On the question whether the loss of the *Guildford* was recoverable as a result of the collision the court held that it was and that the defendants were accordingly entitled to recover their proportion of the consequential damage. Lord Merriman said that whether the master's refusal to be towed made the damage too remote must be judged by whether it was reasonable or unreasonable. The onus was on the defendants to prove that it was reasonable in order to establish the relevant head of damage. They had succeeded in proving that the master's decision was seamanlike and accordingly the final loss of the defendants' vessel could be regarded as a natural consequence of the collision.

W. A. E.

The control of domestic and quasi-judicial tribunals is one of increasing importance owing to the wide powers which these tribunals now exercise.

DOMESTIC TRIBUNAL—Control by court.

It is established that the courts will not interfere with the decisions of such tribunals provided their proceedings are conducted in accordance with what have come to be known as the rules of natural justice. And it is also established that if the powers of the quasi-judicial tribunal are set out in a code of rules to which the party aggrieved is in the circumstances subject, the tribunal is also bound by its own rules and can only mete out punishment in strict accordance therewith. If it does not the courts will interfere.

In *Davis* v. *Carew-Pole and Others* [1956] 1 W.L.R. 833 the plaintiff, a livery stable keeper, was required to attend a meeting of the stewards of the National Hunt Committee who were inquiring into an allegation that, as an unlicensed trainer, he had trained a horse for a steeplechase contrary to the National Hunt Rules. The plaintiff attended the inquiry when, without any prior notification, his alleged activities in connection with the training of two other horses were considered. The stewards then declared the plaintiff a disqualified person. The plaintiff sought an injunction that their decision was *ultra vires*. Pilcher J. held firstly that the mere fact that a person appearing before a domestic tribunal had not been given a formal notice of all the matters in which his conduct was to be called in question, did not necessarily entitle him to contend successfully that the proceedings were not conducted in accordance with the rules of natural justice. His Lordship appears to have based this part of his decision on the fact that no matter was in dispute in relation to the other matters raised and, in the circumstances, the plaintiff was not prejudiced by the lack of notice. His Lordship, however, did hold that, on the evidence and on the true construction of the rules, the stewards were not entitled to declare the plaintiff a disqualified person.

W. A. E.

MASTER AND SERVANT—
Action for loss of services—Crown's action not maintainable.

The case of *Inland Revenue Commissioners* v. *Hambrook*, previously noted in 1956 *Juridical Review*, *ante*, p. 186, has now been appealed to the Court of Appeal; see [1956] 3 W.L.R. 643. In this case a tax officer who was an established civil servant suffered injuries while riding a motor-cycle in consequence of which he was off duty for almost a year, and during which time he received sick pay from the Inland Revenue Commissioners. The accident was caused by his collision with a motor-vehicle driven by the defendant whom the Commissioners then proceeded to sue for damages *per quod servitium amisit*. It was admitted that the defendant was two-thirds to blame for the accident.

In rejecting the appeal and deciding that such an action cannot be brought on behalf of the Crown it is thought that the Court of Appeal proceeded on sounder grounds than the court of first instance where it was held, *inter alia*, that the action could not lie because an established civil servant was not a servant of the Crown. The Court of Appeal confined its decision to saying that this obsolescent form of action now only lay where the servant could properly be regarded as a member of the master's domestic household and not in all cases involving a master and servant relationship. Accordingly it could not lie in respect of an established civil servant at the instance of a Government Department who kept no domestic household. Denning and Parker L.JJ. both expressly stated that if the action lay generally wherever the relation of master and servant existed, the Crown would not necessarily be debarred from bringing it because they had no contract of service with their civil servants and merely appointed them; for the action depended not on a contract of service, but on the fact of service. Civil servants are in fact, as their name denotes, servants for most legal purposes.

With the greatest respect it is thought that this *ratio decidendi* now does much to clarify the status of civil servants and remove some of the difficulties which seemed to result from the opinion of the Lord Chief Justice.

W. A. E.

3. PRIVY COUNCIL CASES

PREMISES FOR LANDLORDS' "OWN OCCUPATION"—Meaning of "premises."

Matthew James McKenna and Another v. *Porter Motors, Ltd.* [1956] 3 W.L.R. 658 was an appeal from a judgment of the Court of Appeal of New Zealand, dismissing an order from the Supreme Court of New Zealand by which the appellants were ordered to give possession to the respondents of a hotel in the city of Palmerston North. The appellants had been lessees of the premises since 1926. In 1941 the respondents bought, with other adjoining property, the reversion of the premises, intending to demolish the hotel and build a garage for the purposes of their own business as soon as they could get possession and obtain the necessary licences. On the expiration of the appellants' lease in 1944 the respondents, by an agreement dated August 29, 1944, granted the appellants a new lease for one year from August 1, 1944. The appellants continued in occupation on the terms of that lease. On September 28, 1951, the respondents served on the appellants the year's notice under section 25 of the Tenancy Act, 1948, as amended by the Tenancy Amendment Act, 1950, and the Statutes Amendment Act, 1950. In 1953 they instituted the present proceedings claiming possession on three grounds, only one of which was material to the present appeal—namely, that based on paragraph (*h*) of section 24 (1) of the above Act. Section 24, headed " Limiting grounds for recovery of possession," provided: " (1) Any order for recovery of possession of any dwelling-house or urban property . . . may . . . be made on one or more of the grounds following . . . (*g*) In the case of a dwelling-house, that the premises are reasonably required by the landlord or by one or more of several joint landlords for his or their own occupation as a dwelling-house: (*h*) In the case of an urban property, that the premises are reasonably required by the landlord or by one or more of several joint landlords for his or their own occupation . . . (*m*) That the premises are reasonably required by the landlord for demolition or reconstruction." The effect of section 25 was that, if a year's notice to quit had been given, an order might be made under section 24 (*h*) although the landlord did not offer alternative accommodation, and no such offer was made in the present case. The appellants submitted that the " premises " meant the subject-matter of the lease, and that in the present case that included the hotel; that there must, therefore, be an intention to occupy the hotel in order to satisfy paragraph (*h*); and that that intention was absent.

The Board agreed with the submission that both in paragraph (*h*) and paragraph (*m*) the word " premises " meant the subject-matter of the lease, and in that respect they could not accept the views of the trial judge and the Court of Appeal. The demolition contemplated by paragraph (*m*) was demolition " on " and not " of " the premises. But, the Board said, it was in the latter part of their submission that the appellants failed. The real question turned on the meaning of " his or their own occupation." Apart from paragraph (*m*), there would be no doubt that a landlord required demised premises for his own occupation although he was intending for the purposes of his occupation to make substantial alterations or put up a wholly new building. The difficulty arose from paragraph (*m*). Was that to be construed as covering all demolition or reconstruction cases, including those where the landlord would remain in occupation, or did the words of paragraph (*h*) limit its operation in the way stated by

Williams J., in *Burling* v. *Chas Steele & Co. Pty., Ltd.* ((1948) 76 C.L.R. 485, at p. 490). That case arose under the National Security, Landlord and Tenant Regulations, which contained provisions (g) and (*l*), similar to paragraph (*h*) and (*m*) in the present case. Williams J. said: " This ground " (that was (g)), " applies whenever the landlord requires the premises, which means the land leased together with the buildings thereon, for his own occupation or for a person associated or connected with him in his trade, calling or occupation. As part of such occupation he is entitled to do what he likes with his own land, including reconstructing or demolishing the existing buildings. Ground (*l*) applies where the landlord requires the premises for reconstruction or demolition with a view to letting or selling them or making some use of them other than his own occupation or the occupation of a person associated or connected with him in his trade, profession, calling or occupation." The Board was of opinion that the scope of paragraph (*m*) was so limited by paragraph (*h*). That gave their natural meaning to the words " for his or their own occupation," while leaving a scope for paragraph (*m*) which accorded with the distinction plainly drawn by paragraphs (g) and (*h*) between landlords who required to relet or resell and landlords who required to occupy. That construction was supported by section 30 which provided, *inter alia*, that a landlord who within two years relet or resold premises of which he had obtained possession under paragraphs (g) and (*h*) should be guilty of an offence. If the appellants' argument were right, one might have expected the demolition and reconstruction of a building within two years on premises of which possession had been so obtained also to have been made an offence. The appeal was accordingly dismissed.

MONEY LENDING: Borrower's recovery of property without repaying balance of loan.

Patience Kasumu and Others v. *Gbadamosi Baba-Egbe* [1956] 3 W.L.R. 575, an appeal from the West African Court of Appeal, arose out of a suit relating to a moneylending transaction between C. O. Kasumu, deceased, of whose estate the appellants were the administrators, and the respondent, who was the borrower, and the plaintiff in the resulting suit. The respondent held a building lease of certain land in Lagos, and on August 25, 1945, he executed a deed of mortgage in favour of

Kasumu, a licensed moneylender, by which deed he assigned the leasehold premises as security for £2,000 acknowledged to have been paid to the borrower at the time of the mortgage, with interest at 15 per cent. until repayment. Kasumu went into possession of the premises in September, 1946, and thereafter he retained possession or receipt of rents and profits, and the appellants continued to do so after his death. In February, 1950, the respondent began proceedings in the Supreme Court of Nigeria claiming redemption of the premises, or, alternatively, a declaration that the mortgage was void; an account of the rents and profits received; and recovery of possession. The appellants set up a cross-action claiming that an agreement had been made between Kasumu and the respondent within a few months of the making of the mortgage by which the respondent had undertaken to convey his equity of redemption to Kasumu, and asking the court for an order that that agreement should be specifically performed. The two actions were consolidated. The Supreme Court ordered that the respondent was to exercise his equity of redemption and recover the premises after an account had been taken to determine what he actually owed on the mortgage and paid off to the estate of the moneylender. An account was taken and the appellants obtained judgment for £1,541 2s. 6d. The West African Court of Appeal reversed these orders and substituted a declaration that the mortgage transaction, not having been recorded in a book as required by section 19 of the Moneylenders Ordinance of Nigeria, was unenforceable; an order that the appellants should deliver possession of the premises to the respondent; cancellation of the mortgage and delivery up of the cancelled deeds and title deeds of the premises. The question in the present appeal was whether as a condition of the relief which he claimed the respondent should be compelled to repay to the appellants so much of the money lent as was still owing, with interest.

Section 19 of the Moneylenders Ordinance provided: "(2) Every moneylender shall keep a book . . . in which he shall enter in connection with every loan made by him (*a*) the date on which the loan was made; (*b*) the amount of the principal; (*c*) the rate of interest; (*d*) all sums received in respect of the loan or the interest thereon, with the date of payment thereof. . . . (3) The entries in the said book shall be made forthwith on the making of the loan or the receipt of sums paid in respect thereof as the case may be. (4) Any moneylender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made. He shall also be guilty of an offence under this ordinance. . . ." The moneylender had not recorded the transaction in a book as required by section 19, and the transaction was therefore unenforceable under that section.

The Board stated that the alleged agreement to assign the equity to Kasumu had dropped out of the picture. The trial judge had held that it was unenforceable and that there was "no effective sale." The respondent's claim that the mortgage was void did not seem to have been supported by any facts deposed to by himself or any other witness called by him, nor was it possible to say to what contention of law it was intended to be directed. The case would have remained simply a redemption action against mortgagees in possession had it not appeared on the face of the pleadings of both parties that Kasumu had committed a breach of section 19 at the time of making his loan or instalments of loan to the respondent. Having referred to the judgments of the courts below the Board stated that, thus, on one view of the rights of the parties, the respondent received back the mortgaged property on paying the balance of moneys outstanding on the loan, together with interest: on the other view, he received it back without being obliged to pay up any money at all, even on the basis that there was as much as £1,541 outstanding.

The words of deprivation in the section, "not be entitled to enforce any claim in respect of any transaction" were very widely drawn and should not be confined to the assertion of rights by means of or in the course of legal proceedings. Thus the performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged, or the retention or taking possession of such property in assertion of the claim to repayment, was also precluded. The scheme of the ordinance was largely modelled on the legislation of the United Kingdom. It did not appear that the Nigerian courts had laid down any principles of their own in the interpretation of the ordinance and the decision now under appeal consisted essentially of a weighing of the authority of *Lodge* v. *National Union Investment Co., Ltd.* [1907] 1 Ch. 300 against that of *Cohen* v. *J. Lester, Ltd.* [1939]

1 K.B. 504. It was evident from what was said in the judgment in the latter case that it would be in accordance with prevailing practice for a court dealing with loans rendered unenforceable by the Moneylenders Act to make an order for the lender to surrender securities without imposing terms as to repayment. In the former case the transaction was an illegal contract, the lender not being registered under the Act of 1900, and repayment of such of the money borrowed as was still outstanding was required as a condition of granting the borrower relief in the form of delivery up of securities. It was not inherently satisfactory that the law should accord to a moneylender who had committed an offence and made an illegal contract more favourable treatment than one who had done no more than enter into an unenforceable bargain. It was necessary to decide whether the principle in *Lodge's* case (*supra*) was capable of being applied consistently with the policy of the legislature shown by such an enactment as section 19 of the ordinance. The Board, having considered that case, stated that the principle ought not to be applied in the case of a transaction declared to be unenforceable under section 19 of the ordinance. If it were, the result would be that a lender who, while offending against the ordinance, had fortified himself by taking any sort of security would be put by the courts in a position altogether more favourable than a similar lender who had taken no security for his loan. For any lender who had taken security, so that the borrower would have to resort to the court in order completely to undo the effect of the transaction, would be protected by the court from parting with his security except on terms which rendered the unenforceable loan enforceable, either to its full effect or in some modified terms. Yet the lender who had taken no security would lose any right to recover his money, as the ordinance clearly intended. It would be wrong that a lender in default should be allowed to defend himself in court by calling for the imposition of terms of repayment, for by so doing he would be enforcing, directly or indirectly, "a claim in respect of the transaction." The provisions of section 19 were not purposeless; they seemed to assume that no loan which was not contemporaneously recorded could be established with sufficient certainty to be recognised at law. If a court were, therefore, to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own with regard to such transactions which was in

direct conflict with the policy of the Acts themselves. The respondent was entitled to relief against the transaction in the form of an order for repossession of the mortgaged premises, cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the premises without being obliged to repay the outstanding balance of the loan. The appeal was accordingly dismissed.

CRIMINAL LAW: Criminal Code and Emergency Regulations.

Andreas Charilaou Zakos and Another v. *The Queen* ([1956] 1 W.L.R. 1162) was an appeal by special leave from a judgment of the Supreme Court of Cyprus dismissing the appellants' appeal from a judgment of the Special Court of Nicosia whereby they were convicted of discharging and carrying firearms contrary to paragraphs (*a*) and (*c*) of regulation 52 of the Emergency Powers (Public Safety and Order) Regulations, 1955, and sections 20 and 21 of the Criminal Code of Cyprus. By section 20 of the code: " When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it . . . (*c*) every person who aids or abets another person in committing the offence." By section 21: " When two or more persons form a common intention to prosecute an unlawful purpose in connection with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence." Regulation 52 provided: " Any person who shall without lawful authority, the burden of proof of which shall lie upon him, (*a*) discharge any firearm at any person or any group or body of persons, or at any place where persons may be, . . . (*c*) carry any firearm or ammunition or any bomb or grenade; . . . shall be guilty of an offence and shall on conviction be liable to be sentenced to death or to imprisonment for life or for such lesser term as the court may see fit to impose."

The Board stated that they had no doubt that counsel for the appellants was right in conceding that, if he failed on the points of law on which he relied (which were not taken before the trial judge or the Supreme Court), he had no valid ground of attack on the facts. On the charges, the submission of the appellants was that sections 20 and 21 of the Criminal Code had no application to charges of offences created by the regulations and that they were, therefore, charged with offences unknown to the law of Cyprus. They were not, it was said, found guilty of themselves discharging or carrying firearms; their " offence " lay in the application to their case of one or other of the provisions of section 20 or section 21 of the code: if those provisions did not apply to regulation 52, there was no offence of which they could be lawfully convicted.

It was argued, the Board stated, that in the code an " offence " was defined in section 4 as meaning an act, attempt or omission punishable by law; that the code did not contain a definition of law, but by section 2 of the Interpretation Law of Cyprus, as amended, " law " was defined as meaning " any enactment by the competent legislative authority of the Colony, but does not include . . . an Order of Her Majesty in Council, Royal Charter, or Royal Letters Patent." Regulations made by the Governor under the Emergency Powers Orders in Council of 1939 and 1952 were the act of the executive authority and did not fall within the definition of law; that, therefore, an offence against the regulations was not an offence punishable by law; and that sections 20 and 21 had accordingly no application to such an offence. In the Board's opinion the answer was supplied by the regulations themselves: paragraph 2 (2) provided: " The Interpretation Law shall apply to the interpretation of these regulations and of any order made or direction given thereunder, as it applies to the interpretation of a law and, for the purposes of the said law, these regulations shall be deemed to be laws." For the appellants it was argued that the sole effect of that provision was to provide that the provisions of the Interpretation Law as to the proper interpretation of laws should apply to the interpretation of the regulations. But that was the meaning and effect to be given to the first part of the subparagraph. The latter part of it appeared to their Lordships precisely to meet the present case and to provide that, where, as for instance in the relevant sections of the Criminal Code, the word " law " was used, it was to be deemed to cover the regulations. But, that consideration apart, it was by no means clear to their Lordships that the word " law," where it was used in the definition of " offence " in the code, had the meaning ascribed to the word " law " by the Interpretation Act. In its context it more appropriately meant the whole body of law for the infraction of which penalties were imposed. If, contrary to the appellants' contention, the regulations fell within the definition of "law," it was then urged that sections 20 and 21 of the code did not apply to their case because section 2 (*a*) of the code provided that "nothing in the code shall affect the liability, trial or punishment of a person for an offence against any law in force in the colony other than the Criminal Code." There was no validity in that argument. When the code came into force other legislation creating offences remained in force and it must have been contemplated that further legislation dealing with particular offences might be passed. The purpose and effect of section 2 (*a*) was merely to provide that the code should not be regarded as exhaustive. It could not reasonably be construed as excluding the operation of the code where it was not inconsistent with the provisions of particular legislation. That was equally true whether sections 20 and 21 were under consideration, or such sections as 16 and 17 which were for the benefit of accused persons. That view was emphasised by the further provisions of section 2 itself, in particular the proviso that, if a person did an act punishable under the code, and also punishable under another law of any of the kinds mentioned in the section, he should not be punished for that act under both laws.

The final contention that sections 20 and 21, or at any rate section 20, of the code had been impliedly repealed by other regulations made under the Emergency Powers Order in Council, and particularly by regulations 72 and 73, also failed. Many of the provisions of sections 20 and 21 were repeated in regulation 72, but that duplication did not involve the repeal of the code or any part of it. That was clearly recognised by regulation 76 (the counterpart of the proviso to section 2 of the code) which provided: " Nothing in these regulations shall affect the liability of any person to trial and punishment for any offence otherwise than in accordance with these regulations: Provided that no person shall be punished twice for the same act or omission." Finally, having regard to the last contention, whatever be the correct view of sections 20 and 21 of the code, a study of the careful judgment of the trial judge indicated that a conviction under regulations 52 and 72 must have resulted if the charge had been so framed without reliance on those sections. The appeal failed on all points and was accordingly dismissed.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, B.A., LL.B., Advocate, Sheriff-Substitute of the Lothians and Peebles

CAUSATION IN LAW

The idea of causation is a difficult one for lawyers. When obliged to consider what is the cause of an occurrence, or what legally speaking are to be regarded as its effects, they are apt either to say that it is merely a matter of common-sense or to fall back on metaphors and catchwords which confuse rather than enlighten. Some, like Dr. Goodhart, think that, by putting the emphasis on responsibility instead of causation, the problems involved can be circumvented. Causation admittedly enters into every case where liability for injury is in issue, because it would be unreasonable to hold a person liable for an injury which he had not caused. But in this sense, he maintains (71 L.Q.R., pp. 411 *et seq.*), causation gives rise only to questions of fact. As soon as a legal system develops it becomes clear that causation, in the purely material sense, is not enough on which to found liability. It has to be limited in some way, since the material causes of every event are infinite. The modern tendency, he asserts, is to ask, not whether the defendant's act has in a material sense caused the injury, but whether he ought to have guarded against the risk. We are now "in the fortunate position that we no longer have to discuss those complicated philosophical questions regarding the nature of causation," especially since courts have the power under the Law Reform (Contributory Negligence) Act of 1945 to apportion responsibility between the parties. "While [that Act] was being finally prepared by Lord Simon, the then Lord Chancellor, I discussed it with him, and he emphasised that he was not going to allow any idea of causation to confuse the issue. Listen to the wording of section 1, which reads: 'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, etc.' There is no question here of using causation as the test of liability." All that has to be determined is whether or not an accident was the result of the defendant's fault for which he ought to be held responsible in whole or in part. It may still be necessary, Dr. Goodhart continues, to determine to what degree each of the parties failed to guard against the risk. "That determination may give rise to difficult problems of evaluation and it may, of course, give rise to a conflict of judicial opinion as in *Stapley* v. *Gypsum Mines, Ltd.* ([1953] A.C. 663), but it has the inestimable advantage that the problem is no longer confused by vague and inaccurate terms which even philosophers have rejected."

No doubt it would be a great advantage for lawyers if the troublesome idea of causation could be disposed of in such a way. But is it feasible? Dr. Goodhart's solution seems to put causation out of the front door only to let it in again by the back door. There is no difference between saying that the cause of an accident was the fault of the defendant and saying that the accident resulted from the defendant's fault. In coming to a decision on liability, it is not sufficient to show that a party was at fault. It must be shown that his fault was a relevant factor in bringing about the injury, and its relevance depends on the causal relationship between the fault and injury. " . . . whether you ask whose negligence was responsible for the injury or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who 'caused' the injury" (*Caswell* v. *Powell Duffryn Collieries Associated Co.* [1940] A.C. 152, *per* Lord Atkin at p. 165). Unless a person has caused, or failed to cause, something to happen he cannot be said to have committed a fault, at any rate in the sphere of law, which is concerned with acts and not motives. The case referred to by Dr. Goodhart, *Stapley* v. *Gypsum Mines, Ltd.*, shows that the power of apportioning responsibility has not by any means rendered it unnecessary for courts to inquire into causation.

In the case in question, two miners of equal status in the defendants' gypsum mine, S. and D., were instructed by their foreman to take down a dangerous roof. Having tried and failed to do so with picks, they agreed to abandon the effort, without resorting to alternative methods or informing the foreman, and proceeded with their normal jobs, which involved S.'s working under the dangerous roof and D.'s going to another place. The roof fell and S. was killed. His widow sued the employers and the trial judge held that S. and D. had each been negligent, and awarded damages, reduced by 50 per cent., against the employers as vicariously liable for D.'s negligence. His decision was reversed unanimously by the Court of Appeal, on the ground that D. had not contributed to S.'s death. The House of Lords, by a majority of three to two, held the defendants liable, but only to the extent of 20 per cent. of the damages. Thus four judges considered that D. was partly responsible for the accident to S. while five judges considered that D. was not responsible at all. There was no dispute about D.'s having been at fault. The question turned on the importance of D.'s fault as a factor contributing to the accident to S. The majority of the judges (the minority in the House of Lords) thought that the part played by D. was too remote to be regarded as contributing to the accident, the effective cause of which was S.'s act in entering and working in the dangerous place. But the contrary view prevailed.

Professor Glanville Williams has criticised the assessment of S.'s liability at 80 per cent. as illogical, since S. and D. were equally at fault, and he thinks that the original award to S. was right (17 M.L.R., pp. 66 *et seq.*). This criticism would seem to be well founded if the sole cause of the accident to S. was the joint failure of S. and D. to take down the roof or alternatively to go for the foreman. But was it? All the appellate judges thought otherwise. In the view of the majority in the House of Lords S.'s failure to have regard to his own safety by entering the dangerous place was distinct from the previous joint fault of S. and D. in failing to take down the roof, but, following *Admiralty Commissioners* v. *S.S. Volute* [1922] 1 A.C. 129, it was not sufficiently distinct to render S.'s subsequent fault the sole cause of the accident. Suppose, argues Professor Glanville Williams, another workman, X, who was not at fault and had no reason to suspect the weakness of the roof, had been injured by the same fall as that which killed S. Clearly X would have had a cause of action against both D. and S. The only difference between X and S. would have been that S. was himself guilty of negligence. This fact, however, should be expressed in terms of contributory negligence, not in terms of remoteness of damage. The argument does not appear to be valid, since it assumes that D.'s duty towards X would have been identical with his duty towards S. The whole point is that S. was aware, and D. knew he was aware, of the danger. Had D. therefore any obligation to protect S. against himself? D.'s duty towards the hypothetical X, who was unaware of the danger, would have been different. On the other hand, it may be said that the crucial factor was not S.'s decision to resume work in the dangerous place, but rather the joint decision of S. and D. to go on working after they had failed to take down the roof, and for this decision part of the responsibility fell on D. The question was whether S.'s resumption of work in the place of danger should be attributed in part to their joint decision or not. It is a very difficult question, as the conflict of opinion shows. The test, however, which Dr. Goodhart would apply, namely, ought D. to have guarded against the risk, does not suffice to determine it one way or the other. Assuming he failed in this respect, it still remains to determine whether the accident to S. resulted in any measure from his failure.

It has become something like a matter of course in cases which raise problems of causation, like *Stapley's* case, for judges to contrast the legal and philosophical conceptions of a cause. Thus Lord Asquith observed that the whole legal doctrine of causation must appear anomalous to a philosopher. To him, if event C could not occur unless each of two previous events, A and B, had preceded it, it would be unmeaning to say that A was more responsible for the occurrence of C than B. But a lawyer distinguished between real, or direct, or effective causes and others which might be dismissed as at best a *causa sine qua non*. He went on to say that he had no doubt a jury would have held the real cause of S.'s accident to have been his resumption of work at the perilous place. It seems doubtful, however, whether the ideas which lawyers imagine philosophers to have on the subject of causation are not just a recollection of some characteristically plausible and unsound arguments of John Stuart Mill. It would be very hard to point to the philosophical conception of a cause, or to any agreement among philosophers about what they mean when they talk of "a cause." We are more likely to get a straight answer to this, or any other, question from a scientist. And the answer would probably be that, as far as he is concerned, there is no such thing as "a cause." "The conception of 'cause'," says Bertrand Russell, "is primitive and unscientific. In science it is replaced by the conception of 'causal laws'" (*Human Knowledge*, p. 474). No doubt there are observed regularities which may be called causal laws, and sequences of events exemplifying these laws may be distinguished. But, though we can speak of one event in a sequence "causing" a subsequent event, it is improper to describe one as "*a* cause" and the other as "*an* effect," since they form part of a continuous and endless process, the earlier being itself the "effect" of other "causes" and the later the "cause" of other "effects."

How is it that the notion of "a cause," which is without scientific basis, appears to be so indispensable to lawyers? The answer is, of course, that law is content to follow common sense as a rule in matters of this kind, and that for the practical purpose of law and ordinary life the sequence of phenomena must be cut from time to time and certain events labelled as "causes" and others as "effects." It is often easy enough to perform this operation. When I fire a rifle at a target nothing is more obvious than to describe the pressure of my finger on the trigger as a "cause" and the hole in the target as an "effect." But there may be complications. If at the moment I am taking aim someone jogs my arm and I press the trigger involuntarily it would be natural to describe the action of the person who jogged my arm as the "cause" of the discharge, and if damage is done by the shot to say that the damage resulted from his fault. It is this latter kind of causal relationship that law is concerned usually to discover. But the process by which law deduces fault, or human responsibility, from damage depends on the factual process by which common sense deduces effects from causes. From the legal point of view, therefore, it is important to know on what principles common-sense is accustomed to make causal deductions. That there are principles upon which the common-sense view of causation is based can hardly be doubted, whether they are valid principles or not. "Common sense is not a matter of inexplicable or arbitrary assertions," as Professor H. L. A. Hart and Mr. A. M. Honoré observe in an interesting and valuable article which appeared recently in the *Law Quarterly Review* (January, April and July numbers, 1956). "The notion of cause which it employs, though flexible and complex, is governed by statable principles even though the ordinary man who uses the notion may not, without assistance, be able to make them explicit." They do not claim that the principles latent in the common-sense notion of causation provide conclusive answers to the causal questions which courts have to face, but that these principles serve rather as an organising framework for answers to legal questions of causation.

It is not without grounds that, in the example just given, common-sense declares that, if I fired the shot voluntarily, but not on the contrary hypothesis, the discharge of the rifle resulted from my action, and that in law correspondingly I may be held to be responsible or not responsible. We tend to assume, where a series of events is traced back to a voluntary human act, that is an act which a person is not constrained to perform by some circumstances external to himself, that there is no need to trace the sequence further back. His voluntary act is no doubt the result of motives and impulses which cause him to do one thing or another, but these are so elusive and for most practical purposes so irrelevant that they can generally be disregarded. It is true that in determining responsibility the broad classification of acts into voluntary and involuntary is not always sufficient. It may be necessary to make distinctions, sometimes very subtle ones, and to assess degrees of voluntariness. Mere absence of physical constraint is not enough to make an act really voluntary, for there are all sorts of moral, psychological or economic factors to be considered which go to diminsh full responsibility without negativing it entirely. For legal purposes in particular, the contrast between deliberate and negligent acts, though both may be classified as voluntary, is important. Since courts of law are bound to come to definite conclusions on questions submitted to them and are shackled by rules and precedents, they may be driven to adopt more rigorous methods of inquiry than common sense would allow, and to resort to refinements which may appear to common sense sophistical.

Thus before the Law Reform (Contributory Negligence) Act of 1945, it was a rule of law that the victim of an accident could recover nothing if he had contributed to the accident by his own fault. The hardship brought about by this rule, which may have had some sort of justification before the days of motor-cars and factories, led courts to evolve subsidiary rules, such as that of "the last opportunity," by which where only minor blame attached to the victim liability could be placed on the other party. There is no doubt that the attempt to reconcile this subsidiary rule with the main rule as to contributory negligence produced results inconsistent with common sense or any other kind of sense. But it would be wrong to conclude that there is no rational ground for the last opportunity rule and that courts can have no use for it now that damages may be apportioned. Even those who deny that what is called in English law the rule in *Davies* v. *Mann* is a rule of law at all would allow that it is a guide helpful perhaps in some cases to the court in determining shares of contribution (*cf.* "Contributory Negligence" by Lord Wright in 13 M.L.R. 2, at p. 12). Where an act might have been done by several persons it is sometimes to be presumed that the one who had the last opportunity to do it was responsible. If a detective investigating a murder case is informed that the dead man was seen just before his death on three separate occasions in company with three different persons and one of them must have been the murderer, he does not need to be a Sherlock Holmes to eliminate two of the persons.

When inquiry is made in ordinary life and in law into cause and effect, the aim is to arrive at a conclusion that explains in a satisfactory manner why a particular event has occurred. What is meant then by saying that event A explains, or causes, event B? It means that A is an event of such a kind that B will not occur if A does not occur, and that if A occurs B will always occur, or in the language of logic that A is both a necessary and sufficient condition of B. The difficulty in practice, when we want to account for a particular event, is that, while one or more antecedent events can be picked out and identified as being necessary conditions, it is impossible to say that any single antecedent event, or even any combination of antecedent events, is a sufficient condition of the later event. Suppose, for example, a road accident occurs through a motor-cyclist running at night into an unlighted car left stationary on the highway. It is easy to point to any number of factors without which the accident would not have occurred: the presence of a stationary car on the road, the failure of the motor-cyclist to see it in time to stop, and so on. But how can any combination of circumstances be mentioned which together sufficed to make the accident inevitable? It is true that if a large number are specified, *e.g.*, the presence of the two vehicles on the road at the same time of night, the fact that the car was stationary and unlighted, the speed of the motor-cyclist, the condition of his brakes and the road surface, his state of mind, etc., it can be said that there was a probability that the accident would happen, and the more circumstances are enumerated the greater the probability. But the occurrence of the accident never becomes more than probable however long the enumeration of circumstances continues. There must always be some that remain undetected. From the point of view of the highway authorities, who are concerned to prevent road accidents, or of the lawyer, who is interested in determining liability, even an enumeration no longer than is needed to create a fairly high degree of probability will still be useless. What is required for their purposes is some means of distinguishing between these circumstances, so that the relevant factor or factors can be identified and the rest eliminated. How can this be done? Clearly there is no scientific basis for selecting one or two out of an indefinite number of circumstances and rejecting the others. On the other hand, it is impossible to believe that it is done arbitrarily. It must depend on some principles, and if so, these must surely be ascertainable.

The solution of the problem appears to be as follows. When we ask how a certain road accident occurred, or what was the "cause" of the accident, we are asking a question of a rather peculiar kind and not merely an ordinary factual one demanding an ordinary factual answer, such as the questions, was the car parked with its lights off, or did the motor-cyclist keep a proper look-out? To demand the "cause" of an accident is strictly a question that cannot be answered. But it is not therefore a meaningless question, and only has to be phrased in a different way to lose its peculiarity. What we really mean when we ask it is, what was there unusual about the causal antecedents of the accident that can constitute a satisfactory explanation of it? Normally vehicles do not collide with one another. If they do, we are interested in finding out why, and this involves the discovery of some abnormal event preceding the accident and causally related to it. In the sciences, as Professor Hart and Mr. Honoré point out, causes may be sought to explain what usually or normally happens. But in ordinary life, as in the law, a causal explanation is most often prompted by the occurrence of something unusual, some deviation from the accepted course of events. "It is an important feature of causal inquiries that from the outset it is always assumed that a considerable number of circumstances are present which, though they may be necessary conditions of some loss or harm or accident, etc., are known to be normal conditions also present on occasions when no disaster occurs." Thus when we inquire into the cause of a railway accident we make a number of assumptions, if there is nothing to show the contrary, about the train and the surrounding circumstances. We take it for granted that the train was travelling at a normal speed and on the proper line, that the driver was alert and drove with ordinary care, etc. To mention these normal conditions obviously does not provide an explanation of the accident, since they are also present when no disaster occurs. But if we discover that there was a defective rail, we know that there was something out of the ordinary that might account for the accident. We may then, although all the conditions mentioned are equally necessary, say that the defective rail was the cause and the others were mere conditions.

We might pursue this argument rather further than the authors take it. They see in the contrast between an abnormal occurrence and normal circumstances one of "the principal criteria for the distinction between cause and condition." It may be said that an analogous contrast is made in giving an explanation of any occurrence the reasons for which are not obvious. An accident, being an abnormal event, is naturally to be explained by showing that some other abnormal event or events preceded it. If we want to find the explanation of an occurrence which is not abnormal, we must look for some antecedent which is not indeed abnormal, but is unfamiliar or unexpected, at least to us. Why otherwise should we want an explanation of it? Suppose, for instance, a child asks what makes the wheels of a railway engine go round. In order to satisfy him we have to tell him some facts about the expansion of steam which may be familiar to most people but cannot be familiar to him, or he would not ask the question. And we can make him understand only by using familiar terms or examples, such as a boiling kettle, so that he can follow what is unfamiliar to him. To say then that it is helpful, in distinguishing between cause and condition, to have regard to the contrast between an abnormal occurrence and normal circumstances is an understatement. This seems to be the means which we always use in explaining an occurrence about which there is doubt, if the occurrence is an abnormal one. And if not, the procedure we follow is analogous.

It is not enough, in order to explain an occurrence, to discover a number of antecedents which are unfamiliar or unexpected or abnormal, and which might all be possible "causes" of it. There is also need to find out which of them best explains it, that is to say, is the "real" or "effective" "cause." The only way of doing so is by a process of elimination until one is left, or perhaps a few which must be regarded as jointly responsible. A number of tests are involved, it may be suggested, in arriving at the best explanation of any accidental occurrence.

(1) Any event can be disregarded which is not (a) a necessary condition or *sine qua non*, of the occurrence to be explained, and (b) cannot in some sense be considered as abnormal according to the nature of the occurrence.

(2) An "abnormal event" is one contrary to the ordinary course. It includes a state of affairs and a human act or omission.

(3) An abnormal event is generally to be disregarded unless it can reasonably be expected, in the light of experience and in accordance with known causal laws, to be followed by the occurrence whose explanation is sought.

(4) There may be an exception to the last rule where two or more abnormal events are necessary conditions of the occurrence. Thus let two successive abnormal events preceding an occurrence C be called A and B. If it is reasonable to expect B to be followed by C and not A, but B may be expected to follow A, then B may be disregarded and only A taken into account as a factor explaining C. Where in the case of two or more abnormal events it is impossible to eliminate all but one, they must be considered as contributing jointly to the occurrence. The test of reasonable expectation is to be used to determine the degree to which they respectively contribute.

In order to clarify this somewhat abstract statement, three concrete cases may be figured. (a) Two cars driven by X and Y collide at a cross-roads owing to fault on the part of both drivers. One of them becomes out of control, and the driver Z of a third car which is approaching has to swerve to avoid it and runs down a pedestrian W. (b) The cars driven by X and Y collide but come to rest at the point of impact, and Z who is following X fairly closely does not apply his brakes as promptly as he should, so that he swerves and runs down W. (c) Z is following X's car at a distance of several hundred yards. He does not stop clear of the cars involved in the collision but comes on recklessly and at the last moment swerves and injures W. In case (a) Z can scarcely be considered to have caused the accident to W any more than I cause a rifle to be discharged if someone jogs my arm as I am taking aim at a target. There is a natural sequence of events leading from Z's swerve to W's injury, but also from the collision to Z's swerve, and therefore X and Y will no doubt be held responsible for the accident to W. In case (b) Z's fault is not solely, but is partly, responsible for the accident to W. X and Y are also responsible for the collision and Z's swerve are so involved with one another that they cannot be separated. In case (c) the accident to W would not have happened if it had not been for the collision involving X and Y. But the collision is a *sine qua non* merely. The " effective cause " of the injury to W is the fault of Z, since it might have occurred in almost the same way if the car driven by Y had crossed his path without colliding with X's car. It cannot reasonably be expected that Z, who has ample time to stop, will behave as he does.

(5) In the last two cases figured above Z's responsibility depends on his ability to foresee and guard against the risk that W may be injured if he does not exercise sufficient care. This does not mean that he in fact foresaw it, but that a reasonably careful driver in this position would have done so. The term " reasonable expectation " may, however, be used in a different sense, in which it is not coincident with the foresight imputed to Z. Suppose that W is a child and that its mother V, who is standing some distance from it and out of sight of Z as he approaches the cross-roads, suffers a shock and becomes ill when she sees W knocked down. It is not possible in an ordinary sense to say that Z, or anyone else in Z's position, could foresee V's illness. But it is at least arguable that Z should be held responsible for it, on the ground that it could reasonably be expected in the light of all the circumstances present, those unknown to as well as known to Z, that V would suffer a nervous shock. The question whether Z's bad driving is the " cause " of V's illness cannot surely be answered one way or the other without considering what could reasonably be expected in this sense.

Similar principles are followed in a purely physical inquiry into the " cause " of an accident. In order to explain, for example, how a house came to be burned down, when no direct evidence is available, an examination will be made of the remains to see if there are any traces of an abnormal event or state of affairs, such as a defect in the electrical wiring. Only a process of elimination can show the possible explanations, and these again must be eliminated one by one until, if practicable, a single factor is left. A choice will often have to be made between alternative possibilities, and in order to choose, the investigator, making use of the facts ascertained and of his scientific knowledge, will try to reconstruct in his mind the course which he expects events took before and after the start of the fire. On the basis of this reconstruction he will come to a conclusion about the " cause " or " causes," which may be established in varying degrees from virtual certainty to slight probability.

(6) Certain assumptions are constantly made both in the ordinary affairs of life and in law, in dealing with problems of causation. Thus it is assumed that, in the absence of constraint of some kind, human beings are free to decide and to act. It would, indeed, be difficult for society to be maintained if the assumption were not universal. In assessing the culpability or otherwise of human actions the question of motives, of mental and physical abilities and various environmental and psychological factors are relevant. But these matters are not regarded as affecting the voluntary character of a person's acts and decisions, provided he is an adult of sound mind. Nor is it the case, as Professor Hart and Mr. Honoré strangely maintain, at any rate not in ordinary usage, that " voluntary " means the same as " intentional," and that a negligent act is involuntary. The distinction between a voluntary and an involuntary act is important, because the former and not the latter is usually regarded as initiating, or interrupting, a causal sequence. The investigator into the fire, if he comes to the conclusion that it started owing to some person throwing down a lighted match on inflammable material, and not in any other way, will be satisfied that he has carried his inquiry as far as he needs to. The question whether the person who threw down the match did so carelessly or deliberately may be very relevant for certain purposes, but is generally irrelevant to causation, which is not concerned with the mental processes preceding voluntary acts. It might, of course, be different if it was a child who threw down the match, because then responsibility might fall on its parents.

(7) There are certain legal rules and presumptions which result in a differentiation between causation in law and the common-sense notion of causation. These legal rules may be based on equity, or on public policy or on practical considerations. The rule, for instance, that a man is to be presumed to intend the natural consequences of his acts may no doubt be justified on several grounds, and as a general rule there is nothing inconsistent with common-sense ideas in it. But, like other general rules, it can occasionally produce paradoxical results on a common-sense view. Since the natural, or necessary, consequences of an act are just the consequences that can be expected to follow it, it is logical for the law to presume further that, if a particular consequence is intended, it cannot be unexpected and therefore cannot be too remote. It would seem that the contrary should also hold good, namely that a consequence which is unexpected is too remote. There does not appear to be any other more satisfactory test of remoteness. But here again it should be emphasised that the test of reasonable expectation does not mean that a person responsible for an injury should not be liable for consequences that he, personally, or someone else in his place, could not foresee at the time he caused the injury. The test is an objective one.

Analysis of the meaning which both common sense and law attach to words like " cause " and "effect " shows that there is no precise sense in which they are used, for the good reason that there is no such entity as " a cause " or " an effect." They are merely convenient terms used in explaining how events occur. The danger is that we tend to forget this and think of " a cause " as some sort of physical force or property inherent in material things. This conception of causation, as Professor Hart and Mr. Honoré point out, has provoked needless puzzles for the law. How can a man's omission or failure to act cause anything to happen, if a cause is analogous to the force of a moving thing? How can a static condition be a cause? Again, fallacious ideas of causation sometimes lead lawyers to suppose that the answers given by courts to causal questions contain a purely factual and scientific element on the one hand and a subjective and arbitrary element on the other hand. It is, however, no more scientific or less arbitrary to say that pressing the switch caused the electric light to go on than it is to say that the road accident was caused by the carelessness of the car driver, although the former can be more confidently asserted than the latter as a rule. Both may be satisfactory explanations up to a point, and both raise further questions, in the one case, what caused the light to go on when the switch was pressed, and in the other what caused the driver to be careless. If the further questions are not asked, it is merely because we do not happen to be interested in the answers to them.

Periodicals also received: *Revista Del Foro* (*Lima*), *The International and Comparative Law Quarterly*, *The Law Journal*, *Revue Internationale De Droit Comparé*, *Connecticut Bar Journal*, *The Western Political Quarterly*, *The Canadian Bar Review*, *La Justicia* (*Mexico*), *Public Law*, *Oklahoma Law Review*, *The American Journal of International Law*, *British Tax Review*, *Jus* (*Milan*), *Textes Législatifs Étrangers* (*Brussels*), *Documentation Juridique Étrangère* (*Brussels*), *The Medico-Legal Journal*, *The British Journal of Administrative Law*.

RECENT LITERATURE

Law and Structures of Social Action. By Kenneth S. Carlston, Professor of Law at the University of Illinois. (The Library of World Affairs, No. 30.) 1956. London: Stevens & Sons Ltd. Price 35s.

Professor Carlston has set out in this book to examine law and the complex of social relationships from a psychological and sociological standpoint. His interests are more in law in the international than in the municipal sphere. In the result it seems difficult to affirm that his study, despite the thought which has gone into its composition and is evidenced by the extensive bibliography and the wide background on which he draws, adds much to our understanding of the operation and relations of law in society. In the early chapters he discusses how regulated conduct becomes institutionalised in human groups and operates as a means of social control, a regulation of human behaviour, in primitive law as exemplified by Malinowski's Trobriand Islanders, in the Roman law, in feudal law and in English law. Thus far there is little of novelty or particular consequence in what he says. The author then, after defining the State as a relation between governors and governed, considers the values accepted in the democratic and the communist State and so comes to a discussion of the world society. One is thus left at this point with the feeling that the book takes far too long to get under way, since the first third of it covers much matter which should be perfectly familiar to most legal readers and at too great length without apparently adding anything material to what is well accepted.

He then turns attention to the modern world and discusses some of the ways in which law operates internationally, both on the public and private planes, noting various ways in which a new *jus gentium* may be seen developing in world society in the form of international organisations and tribunals. Of greatest interest in this part is the examination of the legal aspects of the European Coal and Steel Community.

The last chapters are of the greatest interest, discussing the control of the power of the economic organisation, particularly with reference to the history and interpretation of the Sherman Act of 1890. Of considerable relevance, having regard to the British experiment in the shape of the Monopolies and Restrictive Practices Act, is the tentative conclusion (p. 206) that " the mind and the training of the lawyer do not necessarily approach the solution of the problem of what business activities are in the public interest in the same manner as the mind and training of the economist." The last chapter deals with the individual within the organisation, particularly with reference to the civil service in various countries and to international organisations.

The present reviewer must confess to a feeling of some disappointment in the end and the impression that Professor Carlston's work has not fully lived up to its promise. There is so much description of what is well known on the one hand, and on the other so much use of conceptual terms of a sociological type that no very clear picture or conclusions seem to emerge. One carries away nothing from the reading of the book.

A few mistakes were noticed: Courtenay for Carleton Allen (p. 5); law for lay (p. 220); and *de minimus* (p. 231), while the reference on p. 6, n. 11, to p. 1245 of Malinowski must surely be mistaken.

David M. Walker.

Essays on the Law of Evidence. By Zelman Cowen and P. B. Carter. 1956. Oxford: at the Clarendon Press. Price 35s. net.

In the nine essays of which this volume consists Professor Zelman Cowen, of Melbourne University, and Mr. P. B. Carter, of Wadham College, Oxford, have collaborated to examine in detail some specific aspects of the Law of Evidence. They have selected a variety of topics, some of which have hitherto received little attention in legal literature, and they have made extensive use of the case law of England and the British Commonwealth and of the American common law jurisdictions. They are, of course, concerned in the main with the Law of Evidence as developed and applied in England and in those systems which derive from the English common law. Most of the problems with which they deal are, however, scarcely less familiar to Scottish lawyers. It is, for example, as hard to find a rational justification for much of the law of hearsay in Scotland as elsewhere. The first of these essays, on " Statutory Modification of the Law of Hearsay," which contains a valuable analysis of the English decisions which have followed the Evidence Act, 1938, emphasises the inadequacy of piecemeal reform and the need for re-thinking the whole of this branch of our law of evidence.

Again the constant conflict, to which the authors call attention, between the desirability of admitting all evidence having probative value and the desirability of excluding all evidence of a prejudicial nature has become increasingly apparent in the decisions of the High Court of Justiciary. Two of these essays are particularly interesting for the light they throw on the respective attitudes of the English and Scottish courts to the problems to which this conflict gives rise. In their examination of " Confessions and the Doctrine of Confirmation by Subsequent Facts " the authors are forthright in their conclusion that a confession must be excluded if improperly obtained, whether it is reliable or not, and the judgments of the Lord Justice General and the Lord Justice-Clerk in *Chalmers* v. *H. M. Advocate*, 1954 S.L.T. 177 receive appreciative comment. The following essay on the " Admissibility of Evidence Procured through Illegal Searches and Seizures " includes, in addition to an examination of English, Commonwealth and American authorities, an admirable review of the Scottish cases, and concludes that the proper criterion of the admissibility of such evidence is that enunciated by the Lord Justice-General in *Lawrie* v. *Muir*, 1950 S.L.T. 37.

Although it is only in these two essays that direct reference is made to the Scottish authorities, it is to be hoped that this volume will find its way into the hands of many Scottish lawyers. It presents, in a notably lucid and readable form, much material for profitable reflection and discussion.

J. A. Smith.

British Colonial Judges. Their Appointment and Tenure of Office. A Study by The Inns of Court Conservative and Unionist Society. 1956. London: Sweet & Maxwell, Ltd. Price 2s. net.

This pamphlet can be regarded as supplementing the article published in last April's issue of *The Juridical Review*, on the independence of the Colonial judiciary. Both regard the Crown's power to dismiss or to compulsorily retire a judge as undesirable, and both contain proposals aimed at ameliorating the present position. The authors of the pamphlet, however, seem not to possess a first-hand acquaintance with the problem which, indeed, is far from being easy of solution. For example, it is recommended that an " Overseas Judicial Service " should be set up, from the ranks of which all judges of superior courts should be appointed, and it is also suggested that Governors of Crown Colonies should no longer add their comments to confidential reports on judges submitted to the Colonial Office by the Chief Justices of the territories concerned. But it is not stated what it is proposed to do with the present members of the Colonial Legal Service, other than judges, if such a judicial service is instituted. The great majority of colonial judges have been appointed from the magistracy or the Crown law office in the same or another colony, and many of them have spent most of their careers as law officers. At times the majority of Chief Justices have been former Attorneys-General who have never been puisne judges. And there have been cases where a puisne judge has become an Attorney-General and has then returned to the bench as Chief Justice of the same colony. If promotion of magistrates and law officers to the High Court bench is to continue, as it obviously must, the creation of a separate judicial service seems hardly called for, and it seems somewhat invidious that the Governor of a Colony should, for example, be able to spoil the prospects of an Attorney-General becoming a Chief Justice while being precluded from commenting adversely on a puisne judge.

Then it is stated that until the latter half of the nineteenth century there was a dearth of suitably qualified candidates for the judicature, but that that did not apply today. But in fact there has almost always been a lack of suitable candidates for certain colonial legal appointments because their value has been far below what would attract them, and so long as each colony remains responsible for paying its own judges (and in many cases they can ill afford even the meagre salaries they do pay), a generally high standard of qualification cannot be expected.

It must be conceded, of course, that a judiciary independent of the executive is most desirable everywhere, and that it be secured, so far as is possible, in every case where a former Crown colony becomes an independent unit within the Commonwealth. The majority of such territories are likely to become self-governing in the near future, and as regards the remainder, it can be argued that unless it can be shown that the existing system is really detrimental to the independence of their judges (of which no evidence has been adduced) there seems little justification for any radical change in the system of appointment and tenure of office of judges in territories still controlled by the Colonial Office. *Terrell's* case seems to be an isolated one, and it is difficult to believe that the career of an upright and competent judge could be adversely affected by a Governor's disapproval of some of his judicial decisions.

C. C. Ross.

OTHER PUBLICATIONS RECEIVED

(*A later review is not precluded, especially where books are received shortly before going to press.*)

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